

CANADA / JUDGMENT

## R v WD

2021 BCSC 2032

### COURT

Supreme Court of British Columbia

### DECIDED

19 May 2021

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2021 BCSC 2032 R. v. WD

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. WD,

2021 BCSC 2032

Date: 20210519

Docket: 26303

Registry: Nelson

Regina

v.

WD

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- s. 486.4: any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

(Stage 2: s 278.7 decision: production of record to accused)

Counsel for Crown:

Cheryl-Anne P. Pine

Counsel for Accused:

Donald J. White

Counsel for Complainant:

Tylen Underwood

Place and Date of Hearing

(by videoconference):

Nelson

December 11, 2020

May 7, 2021

Place and Date of Judgment

(by videoconference):

Nelson

May 19, 2021

## **I. Introduction**

- [1] On May 7, 2021, the Court granted the accused's application under s 278.5 of the Criminal Code, RSC 1985, c C-46 that the complainant's mental health, psychiatric, psychological, therapeutic, and counselling records since July 2, 2019 in the possession of the Kootenay Boundary Regional Hospital (Trail) and the Royal Inland Hospital (Kamloops) be provided to the Court for review to determine whether any portions of those records should be provided to the accused: 2021 BCSC 2029
- [2] These reasons concern the second stage of the process, under s 278.7, after the Court's review of those records to determine which records should be produced to the accused, if any, and under what terms.
- [3] The accused is charged under s 271 with sexual assault, in events alleged to have started the evening of Canada Day, continuing through the morning of July 2, 2019.
- [4] On June 15, 2020, in the course of a discussion with the Crown, the complainant's mother disclosed the following (as quoted from the Crown's disclosure letter):

- a) shortly after the sexual assault alleged on information 26303-1 [the complainant] developed psychoses that led her to believe that a person in her life (known to her) was perpetrating crimes against her and trying to cause her harm (note this person is not the Accused); and
  - b) her psychosis led her to report the allegations to police before they apparently became so far-fetched that the police and the complainant's family realized that she was suffering from psychoses.
- [5] The earlier reasons set out further factual and legal context, which I will not repeat here. The accused agrees that sexual activity took place; he disputes that any of it was non-consensual. Key issues at trial will be whether the complainant subjectively consented to the sexual activity, whether she communicated consent to the accused, and whether the accused had an honest but mistaken belief in consent. As the alleged sexual assault is very much a he said-she said scenario, credibility and reliability will be critical issues. Overarching all of these issues is whether the complainant was suffering from a psychosis, or had consumed alcohol or cannabis, at the time of the alleged sexual assault and, if so, whether any of these states may have affected any of the above issues.

## II. Law

- [6] Section 278.7 sets out the second stage of the 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).

### **Factors to be considered**

- (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.

### Conditions on production

- (3) If the judge orders the production of the record or part of the record to the accused, the judge may impose conditions on the production to protect the interests of justice and, to the greatest extent possible, the privacy, personal security and equality interests of the complainant or witness, as the case may be, and of any other person to whom the record relates, including, for example, the following conditions:
- (a) that the record be edited as directed by the judge;
  - (b) that a copy of the record, rather than the original, be produced;
  - (c) that the accused and counsel for the accused not disclose the contents of the record to any other person, except with the approval of the court;
  - (d) that the record be viewed only at the offices of the court;
  - (e) that no copies of the record be made or that restrictions be imposed on the number of copies of the record that may be made; and
  - (f) that information regarding any person named in the record, such as their address, telephone number and place of employment, be severed from the record.

### Copy to prosecutor

- (4) Where the judge orders the production of the record or part of the record to the accused, the judge shall direct that a copy of the record or part of the record be provided to the prosecutor, unless the judge determines that it is not in the interests of justice to do so.

### Record not to be used in other proceedings

- (5) The record or part of the record that is produced to the accused pursuant to an order under subsection (1) shall not be used in any other proceedings.

### Retention of record by court

- (6) Where the judge refuses to order the production of the record or part of the record to the accused, the record or part of the record shall, unless a court orders otherwise, be kept in a sealed package by the court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the record or part of the record shall be returned to the person lawfully entitled to possession or control of it.
- [7] Just as the decision of MacNaughton J in *R v RMR*, 2018 BCSC 1889 helpfully provides the governing legal principles at the first-stage s 278.5 decision, her decision in *R v RMR*, 2018 BCSC 1957, usefully guides this second-stage s 278.7 decision:

- [6] As explained in *R. v. Mills*, [1999] 3 S.C.R. 668, at the second stage of the disclosure process, with the assistance of having the diary and knowing its contents, I must be satisfied that the diary is likely relevant and that production to the defence is necessary in the interests of justice. I am, 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 following s. 278.5(2) factors:
- (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.
- [7] I am not required to rule conclusively on each of the s. 278.5(2) factors, or to balance the competing rights; again, I am only to take the factors into account when determining whether production to the accused is necessary in the interests of justice: *Mills* at para. 141. If I order production, I may do so with conditions under s. 278.7(3).
- [8] Although s 278.7(2) permits the judge to hold an in camera hearing to receive submissions of the parties in the course of the review, it was not necessary to do so.

### III. Discussion and decision

- [9] In the first stage, the hypothetical value of the clinical records focused on three interrelated issues: subjective and communicated consent in what will likely be a he said-she said sexual assault trial with limited corroborative evidence; the credibility and reliability of the complainant; and alcohol and cannabis consumption by the complainant on the days of the alleged assault. Those records could also contain the complainant's own accounts of the alleged sexual assault.
- [10] The Court's review of these records confirmed that the records inform, to some extent, all of these issues. The interests of justice necessitate that a portion of those records be produced to the accused.

- [11] Specifically, those records reveal that at least as early as July 27th (25 days after the alleged sexual assault) the complainant was exhibiting an acute and elaborate paranoid psychosis. She suffered the ongoing delusion that the father of an ex-boyfriend had sexually assaulted her hundreds of times, and had set a "kill date" to murder her on her birthday. She believed that the boyfriend's father was in fact Richard Ramirez, a California serial killer, who, notwithstanding his ostensible 2013 death, had escaped from prison and adopted a new identity in Canada. These delusions prompted the complainant to report the father/Ramirez to the RCMP for sexual assault and other crimes. The treating psychiatrists and health care professionals, based on their own observations as well as reports from other individuals, concluded that these alleged sexual assaults were delusional and wholly ungrounded in reality.
- [12] While the complainant's paranoid delusions overwhelmingly focussed on this one individual, there are indications in the records that she also directed paranoid delusions of persecution and sexual violence towards other persons.
- [13] That said, the records of the complainant's statements to health care professionals about the sexual assault alleged in this proceeding are not tainted by delusion or paranoia in any obvious way. For what it is worth at this preliminary stage, the records include comments by the treating physicians that, in contrast to the complaint's statements about the father/Ramirez, the complainant's statements about the present alleged sexual assault did not exhibit delusional qualities.
- [14] The records also include the complainant's own handwritten account of the sexual assault alleged in the present case: a document of central relevance. Again, for what it is worth at this preliminary stage, that account exhibits no delusional aspects on its face. That said, the immediately preceding record recounts another sexual assault alleged by the complainant: this one by the father/Ramirez, alleged to have occurred in June 2019, just days or weeks before the alleged assault at the base of this present criminal charge.
- [15] One diagnostic hypothesis advanced by the treating professionals is that the complainant's psychotic state may have been triggered by marijuana consumption; another is that the delusions are the result of past traumas, which could include the present alleged sexual assault, if true.
- [16] The records do not pinpoint when the delusional psychosis first developed or manifested itself. The notes record her own recollection that she reported one of the delusional sexual assaults by the father/Ramirez in April 2019 to a friend, who dissuaded her from reporting it. Other documents record her reports that the father/Ramirez began tormenting and sexually assaulting her variously in July 2015, September 2018, and March 2019: all before the alleged sexual assault in the present case. Whether she contemporaneously perceived or reported these delusional events in July 2015, September 2018, March 2019, or April 2019, or whether these historic reports themselves are false memories, as part of an August-October 2019 delusion spell, is not clear from the records.

- [17] These issues no doubt will be the subject of evidence from psychiatrists, family members, friends, and workmates of the complainant at trial. The temporal and thematic proximity of the psychotic delusions to the facts and issues in this case make clear that limited specific excerpts of these records must be produced to allow the accused to make a full answer and defence (s 278.5(2)(a), among the factors incorporated into s 278.7(2)) and to preserve the integrity of the trial process (s 278.5(2)(d)).
- [18] If the complainant suffered from psychotic delusions of sexual assault, or consumed significant amounts of marijuana, on the date of the alleged sexual assault, the records would have potentially high probative value (s 278.5(2)(b)). The fact that a sexual assault complainant suffers from a delusional psychosis that may affect her perception and recall of reality is a relevant factor in assessing the reliability of her testimony: see *R v Gauthier*, 2020 BCSC 146 at paras 104-105 (where the accused was acquitted of sexual assault[1]) and *R v Adubofour-Poku*, 2016 BCPC 426 (where the accused was convicted of sexual assault notwithstanding the complainant's delusional psychosis).
- [19] In this, the production of the records is not based upon a discriminatory belief or bias that a person undergoing psychiatric treatment is by that fact alone less credible or reliable (s 278.5(2)(d)): the present is not the case of a complainant receiving psychiatric treatment for a wholly unrelated mental condition years before or after the alleged event.
- [20] Production of the records will not promote s 278.5(2) factors (c), (e), (f), or (g). That said, the records predominantly comprise the observations and diagnoses of treating medical professionals, rather than the personal and intimate writings of the complainant, such as the diary ordered produced in RMR. Here, only the accounts of the two alleged sexual assaults, referred to above, are directly composed by the complainant: these consist of 2.5 pages.
- [21] Further, the following restrictions and protections that this Court imposes under s 278.7(3) will ensure that production impinges upon the complainant's reasonable expectations of privacy to the least drastic extent.
- [22] First, the pages produced have been extensively redacted by the Court. The primary subjects of redaction are:
- a) references to third-party individuals except insofar as they are directly necessary to understand the nature of the paranoid delusions of sexual assault and the known history of that psychosis;
  - b) references to the complainant's intimate thoughts and feelings after the alleged sexual assault, which are not relevant to her subjective consent on the night of the incident;
  - c) references to the complainant's past relationships, health conditions, sexual activity, and medical treatments, except insofar as they are directly necessary to understand the nature of the paranoid delusions of sexual assault and the known history of that psychosis;

d) references to the complainant's ongoing pharmacological and other treatments, except insofar as they are directly necessary to understand the nature of the paranoid delusions of sexual assault and the known history of that psychosis;

e) references to general and irrelevant health and psychiatric/mental assessments of the complainant.

[23] Production is limited to 144 pages of the 1250 pages produced by the two institutions. Most of those pages have been significantly redacted by the Court.

[24] Further, pursuant to the following subsections of s 278.7(3), the Court orders that:

(c): the accused and his counsel not disclose the content of the records, as redacted and disclosed to them, to any other person without the approval of the Court or consent of the Crown;

(e): the accused and his counsel make no more copies of the records than are strictly necessary to conduct the defence. Those documents are to remain at defence counsel's office, kept in a secure location, except while at or in transit for trial or for a court process, or for another purpose authorised by the Court or consented to by the Crown. Photocopies must be made directly by defence counsel, or under his direct and continued supervision, to ensure that no disclosed document or copy thereof escapes his control. Subject to the above, they must not be emailed or electronically transmitted. Under no circumstances may the accused himself take or retain a copy of any of the records; they must be viewed with his counsel.

[25] Pursuant to s 278.7(6), the entire file, produced and unproduced, will be kept in a sealed package by the Court until the later of the expiration of the time for any appeal and the completion of any appeal in the proceedings against the accused, whereupon the records will be securely shredded.[2]

[26] At the last hearing we marked the Trail records as Exhibit A and the Kamloops records at Exhibit B. The released Trail records will be marked as Exhibit A-1; the released Kamloops records will be marked as Exhibit B-1.

Crerar,J.

[1] Although convicted of the charge of aggravated sexual assault: the complainant contracted AIDS from the sexual contact with the accused.

[2] The Criminal Code contemplates a return of the records to the institution but as the Court was provided copies, shredding will be a more secure method of disposal.

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