CITATION: R. v. R.S., 2024 ONSC 1806
COURT FILE NO.: CR-22-50000531
DATE: 20240327

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: R v. R.S.

BEFORE: S.F. Dunphy J.

COUNSEL: *Sujung Lee and Andrew Bigioni*, for the Defendant Applicant

Kelly Simpson, for the Crown Respondent

HEARD at Toronto: March 21, 2024

REASONS FOR DECISION – Application for Adjournment

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Pursuant to section 486.4 of the Criminal Code an order has been made in these proceedings directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way. These Reasons for Decision have been anonymized to omit any reference to the name or other identifying characteristics of the victim and may be published in any digest or compilation of decisions of the court.

[1] On March 22, 2024, I dismissed a motion to adjourn this trial in order to permit a third-party records application under s. 278.3 of the *Criminal Code*. In so doing, I indicated my written reasons would follow. These are those reasons.

[2] An application for the adjournment of a trial in these circumstances requires the assessment and balancing of a number of interests broadly captured by the phrase "the interests of justice". Among the interests to be considered are:

a. the right to full answer and defence of course and any prejudice to that right if the adjournment were not granted;

b. the stated reason for the adjournment and the likelihood of that purpose being served by the adjournment requested;

c. the impact on the proceedings and the public interest in a trial on the merits;

d. the interest of the public and of the accused in the completion of this and other trials within a reasonable time; and

e. the likely duration of the delay.

[3] There is no section 278.3 application before me at this point. This is an application for an adjournment to pursue such an application. There are numerous hurdles to be cleared before such an application could be heard. The procedure described in s. 278.3(5) must be complied with or, where applicable, orders must be sought and obtained to alter or waive strict compliance with them. Among other yet uncrossed hurdles is (i) actually identifying with precision the records sought and (ii) obtaining the names of the record-keepers. These can be described relatively generically from the information available at present but the necessary information of names and addresses of potential record holders, the dates of their involvement etc. have not been gathered at this point. I cannot presume that the complainant will cooperate at all in any further procedures involving this case, still less in a request for personal information, the disclosure of which would likely lead to her recall as a witness given her state of emotional exhaustion after 2.5 days of cross-examination. I indicated to the parties that I would entertain the adjournment application at this juncture recognizing that there are hurdles such as these to be crossed in proceeding with the intended application. If granted, the adjournment would of course be subject to completing those additional tasks required to bring an application as stipulated in s. 278.3(5) and a timetable for doing so would have to be prepared and adhered to.

[4] To consider this application and the grounds for it, I am necessarily compelled to examine the complainant's evidence. She is the sole witness called by the Crown who rested its case after her testimony. The only evidence available for the intended application is the complainant's evidence at trial and any evidence assembled prior to trial. The defence candidly admitted that the state of the evidence prior to trial was wholly inadequate to sustain a credible s. 278.3 application. While it is clearly far too early in the trial to start to venture opinions on the credibility or reliability of the complainant's evidence, the fact remains that it is the only additional evidence relevant to the proposed application that has been added to the insufficient state of the record that existed before the trial. If I am to assess whether the interests of justice can be invoked to suspend this trial in mid-stream, I must draw at least some factual conclusions from her evidence, which evidence has been subjected to very detailed cross-examination with this very application in mind, and for the purposes of this application only.

[5] The possibility of this application was of course in the air throughout the various judicial pre-trials that preceded trial and during the cross-examination of the complainant as well. The defence concluded that the evidentiary record as it existed prior to the trial was insufficient to warrant a s. 278.3 application. The possibility that additional evidence might surface at trial warranting a re-examination of the issue was addressed by all of the parties during their various pre-trial appearances, but no agreement was reached beyond leaving it to the trial judge to assess at the relevant time. The defence completed its cross-examination without prejudice to resuming it following a successful s. 278.3 application after which the Crown closed its case.

[6] What then was the state of the evidentiary record before the start of trial that was judged to be inadequate to warrant proceeding with the application in the time frame contemplated by s. 278.3(5)?

[7] The only relevant pre-trial evidence to which I have been directed is the statement of the complainant to police given in February 2022 about events that she said occurred almost 40 years earlier between 1985 and 1987. In the course of that statement, the complainant outlined what she could remember of the details of certain instances of abuse she allegedly suffered as a 10 – 12 year old girl at the hands of the accused who was then a friend of her parents. She mentioned that she had been in hospital "for this" and seen psychiatrists and psychologists "that I'm still seeing right now". The inference that "this" was in reference to the abuse she said she suffered at the hands of the defendant and outlined in her statement is unavoidable in the context. She also indicated that she had told her husband before her wedding "that this happened" but "didn't give him any details" and "would talk to [him] about it when I'm ready to". She also mentioned having told an aunt about it when in hospital.

[8] There was thus evidence that the subject-matter of her alleged abuse had been discussed (i) with psychiatrists and psychologists; (ii) with her husband prior to their wedding; and (ii) with an aunt. The last of these was hearsay evidence – the complainant did not recall that she had spoken to the aunt about this subject but was reminded that she had by her father. The names of the relevant professionals were not mentioned by the complainant but the fact that they would likely have some records of their interactions with the complainant requires no great degree of speculation. There is no suggestion that the husband or the aunt made any records that could be the object of an application.

[9] The defence therefore had evidence that the complainant had been discussing "this" which in the context is the allegations of abuse referenced in her statement with mental health professionals since the time of her hospitalization related to or arising from the same cause. There was also evidence and that she had earlier mentioned the existence of abuse to her husband prior to her wedding but told him few details and didn't feel ready at that time to reveal more.

[10] This was the state of the record that the defence judged inadequate to warrant commencing a s. 278.3 application more than 60 days in advance in order comply with s. 278.3(5) of the *Criminal Code*. How has the situation changed since the complainant provided her evidence in chief and was cross-examined over 2.5 days?

[11] In my view, the additional evidence obtained after such lengthy cross-examination has not moved the ball any further down the field than it was before the trial began. The complainant has filled in some time parameters: the hospitalization referenced appears to have been in or about 2007. The discussion with her husband – as bare-bones as the statement suggests it was – occurred prior to their wedding in 2004. There was some reference to having discussed the subject of her abuse several years before that when

seeking mental health counselling while in university and living out of town. In the last moments of a grueling cross-examination that left her very near the point of mental exhaustion she agreed that she may have “conflated” (a word with which she was not familiar) her memory of the colour or type of track suit she said the accused wore on one occasion with her memory of what he wore on another. That minor confusion itself was present and frankly admitted to by her in her original police statement.

[12] In my view, the additional information derived from her cross-examination represents a difference in quantity of information relevant to the intended application but not a material difference in quality.

[13] The complainant’s evidence viewed fairly and as a whole provided no basis whatever to support the thesis that her memory of these events has been recovered or influenced by her various sessions with mental health professionals and indeed quite forcefully rejected such suggestions. There is no evidence that has emerged of any mental condition relevant to her capacity to recall or credibility. While the complainant referred to having “suppressed” her memory of certain events on several occasions, her evidence in its full context explained what she meant by this phrase. She consistently maintained that she always knew of the fact of her abuse and by whom. The particular instances of abuse related by her were similarly always known by her. None of this was forgotten so much as she chose not to bring such memories to the surface as a coping mechanism. She “suppressed” these memories only in the sense of forcing herself not to think of them due to the fact that the accused was a friend of her parents, later lived across the street from them and was an integral part of the social circle that her cultural milieu expected would be participating in family functions over the years. She felt unable to confront her parents about the abuse but distanced herself from her abuser as far as she was able in the circumstances.

[14] Her evidence fairly viewed was that therapy has assisted her in coping with these memories but not in recalling them. Her evidence at trial provides no additional evidentiary foundation that is specific to this case relevant to the intended application beyond the facts available before the trial began and was judged to be inadequate to sustain the intended application.

[15] The complainants’ evidence confirms what common sense suggests. Where the subject of her childhood abuse has surfaced in the course of therapy sessions with medical professionals, it has been the fact of the abuse rather than the particular details of individual episodes of abuse which has been the primary subject of discussion. There is no evidentiary basis to infer that therapists would have examined the complainant on the details of the events in a fraction of the detail that the complainant has been subjected to in more than 2.5 days of close examination. The two types of examination – one forensic and the other therapeutic – have entirely different objects.

[16] In my view, that conclusion based on my review of the whole of the evidence of the complainant essentially disposes of this application.

[17] No additional evidence has emerged to support the thesis of recovered memory or tainted memory – an observation that in no way precludes arguments being directed to that thesis or generally towards the frailty of memory of events at such a great distance in time at the close of trial. The only other grounds of potential likely relevance raised by the defence all fall squarely within the list of grounds listed in s. 278.3(4) that Parliament has determined are not sufficient on their own to justify production. There is a high expectation of privacy attaching to such records and the evidentiary record establishes nothing case-specific to establish the likely relevance of these records to an issue at trial.

[18] This case has a number of parallels to the case of *R. v. P.E*., [2000] O.J. No. 574, 129 O.A.C. 369 (Ont. C.A.). In that case, the appellant sought production of records made by an unnamed therapist but at a named clinic. There as here, the complainant had previously discussed the matter with her husband and other persons before seeking therapy and there was no evidence that counselling had influenced her recollection of the events. The Court noted (at para. 16) that:

> *All of the submissions made by the appellant fall within one or the other of these categories. In Mills at p. 380, the court held that an accused is not prevented from relying on these assertions "where there is an evidentiary or informational foundation to suggest that they may be related to likely relevance". There is no such foundation. As we have pointed out, there was nothing to suggest that the complainant had recovered these memories of abuse or that the counselling had influenced her memory. The submissions made on the application at trial and on this appeal amount to nothing more than bare assertions. There is, in the words of the court in Mills at p. 380, "no case-specific evidence or information to show that the record in issue is likely relevant to an issue at trial".*

[19] I was asked by the defence to treat historical sexual assault allegations as a category apart where the benchmark of likely relevance is different or where the complainant's interests are somehow entitled to less weight in the s. 278.3 process than might be the case with a non-historical complaint.

[20] That assertion lacks logic and common sense. An alleged record of a fresh allegation and a record of an allegation of an older allegation both raise precisely the same issues of potential relevance and must be balanced in the same way. Sexual assault complaints seldom involve an eyewitness to the actual assault apart from the complainant and the accused and the credibility of the complainant is always a central issue in such cases. The high expectation of privacy of a complainant that must be balanced in the s. 278.3 process is not lessened by the age of the allegation. The clear intent of Parliament as enacted in s. 278.3(4) is that the grounds for disregarding that

expectation of privacy must go beyond mere speculation on its own but requires additional, case-specific evidence.

[21] There is always the prospect that another account by the complainant of the events giving rise to the charge – no matter how detailed or sparse that account –may differ in some way great or small from the account relayed by the complainant to police or on the witness stand. Applying so low a standard of "likely relevance" would strip s. 278.3(4) of any meaning and frustrate the intent of Parliament.

[22] In *R. v. W.B.*, 2000 CanLII 5751 (ON CA), Doherty J.A. wrote (at para. 71):

> *If the likely relevance bar is that low, it serves no purpose where the records relate to counselling or treatment connected to allegations of sexual abuse. It is impossible to imagine that such records would not contain references to the alleged abuse or matters that could affect the credibility of the complainants' allegation of abuse. In my view, the mere fact that a complainant has spoken to a counsellor or doctor about the abuse or matters touching on the abuse does not make a record of those conversations likely relevant to a fact in issue or to a complainant's credibility.*

[23] See as well at para. 77 of *W.B.*, where Doherty J.A. remarked that it "will not, however, suffice to demonstrate no more than that the record contained a statement referable to a subject matter which would be relevant to the complainant's credibility. The mere fact that a witness has said something in the past about a subject matter on which the witness may properly be cross-examined at trial does not give that prior statement any relevance."

[24] The Crown's burden of proof in an historical allegation is not altered by the age of the allegation even if the practical impediments to proof to that standard are inexorably magnified by the passage of time. The general observation that memories are frail and degrade with time is a truism and may well contribute to reasonable doubt which it is ever the Crown's burden to dispel before a guilty verdict may issue. This is so whether the elapsed time is six months or forty years. Nothing in the passage of time diminishes the privacy expectations of the complainant nor does it render less speculative an evidence-free fishing expedition into records without more given the directions contained in s. 278.3(4). This is why the courts since *Mills*[1] have required case specific evidence that goes beyond the mere existence of a potential fishing ground.

[25] As noted, this is NOT an application under s. 278.3 but is an application for an adjournment to pursue such an application. The hurdles in front of such an application

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[1] *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668

are relevant to this application for an adjournment but not dispositive of it. Those hurdles include the lack of information about the putative record holders and the lack of a clear path to obtain such information from a complainant whose willingness or ability to participate further in these proceedings are in considerable doubt. They also include the lack of any qualitatively new evidence to supplement the evidentiary record that defence counsel agreed was inadequate to support an application in the manner and time contemplated by s. 278.3(5). They include the criteria listed in s. 278.3(4) which by themselves Parliament has determined are insufficient to ground such an application.

[26] Weighing those hurdles in the balance along with the other criterial required to be addressed in determining where the interests of justice lie, it appears to me that the interests of justice would not be served by granting the requested adjournment. The applicant is in essentially the same unsatisfactory position as regards the evidence supporting the intended application as he was prior to trial. An adjournment would likely require several months to run to ground such threshold issues as the names of record keepers, the retention of counsel for the complainant and potentially the relevant record keepers. The likelihood of success of the application and the likelihood of relevant information emerging from it are both entirely speculative. Meanwhile, the *Jordan* date for this trial would inevitably pass by.

[27] There are systemic and public policy reasons to be cautious about this type of application as well. Such concerns needn't be governing in order to be entitled to some weight in the balancing process, but I must be mindful of not giving a "pass" to administrative practices that impair the right of full answer and defence because of resource limitations.

[28] There is no general right of pre-trial discovery in criminal law. Over time, procedures have evolved to required Crown disclosure of potentially relevant documents in its possession or control (*R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 SCR 326) and governing the production of documents from third parties not in the Crown's possession or control (*R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 SCR 411). In 2019 Parliament chose to restrict the access to a preliminary inquiry which closed a significant discovery tool to the defence in sexual assault cases. This case has thus proceeded to trial without the benefit of a preliminary inquiry.

[29] It is not the role of a trial judge hearing a mid-trial adjournment application to attempt to replicate that which Parliament has constitutionally chosen to restrict simply because the old way of doing things appeared to offer some advantages. Parliament's policy objective in limiting access to a preliminary inquiry was intended to extend a measure of protection to victims of sexual violence from the ordeal of being subjected to re-living their trauma through cross-examination on multiple occasions and that policy objective, while certainly not absolute, should not lightly be interfered with. Further, the highly likely consequences of adjourning trials in these circumstances upon the efficient conduct of trials within a reasonable time can easily be surmised and would substantially

defeat that objective of Parliament. Victims of sexual violence frequently seek treatment in the form of therapy and counselling and Parliament has sought to protect and encourage them in doing so,

[30] None of these factors are absolute. In *R. v. Barton*, 2019 SCC 33 (CanLII), [2019] 2 SCR 579 Moldaver J. discussed at some length the delicate balance that Parliament and the courts have sought to achieve over the years between the right of an accused to make full answer and defence and the social interest in encouraging the reporting of sexual assault offences, eliminating discriminatory or myth-based reasoning from the process and fostering an environment that encourages treatment of victims. These interests are clearly fundamental social values that need to be balanced and recognized without one excluding the other.

[31] Weighing all of these factors in the balance, I have concluded that the interests of justice do not favour interrupting this trial in these circumstances as requested and I dismissed the application.

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S.F. Dunphy J.

Date: March 26, 2024