SUPREME COURT OF YUKON

Citation: *R v Amin*, 2023 YKSC 23

Date: 20230508
S.C. No. 20-01515
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

RUDRA PULASTYAKUMAR AMIN

Before Chief Justice S.M. Duncan

Counsel for the Crown — Faiyaz Alibhai (by video)

Counsel for the Defendant — Jennifer Budgell

Publication, broadcast, or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*. [This ban does not apply to Michelle Palardy]

REASONS FOR DECISION

Introduction

[1] Rudra Amin is charged with seven counts of sexual assault against three complainants contrary to s. 271 of the *Criminal Code*, RSC, 1985, c. C-46 (the "*Criminal Code*"). He brings an application in writing for a preliminary determination that ss. 278.1 and 278.92 to 278.94 of the *Criminal Code* do not apply to certain evidence in his possession that he wants to introduce at his trial. Stated simply, he is asking the Court for directions about whether text messages in his possession written by one of the complainants to a mutual friend are legally considered to be a "record" under s. 278.1. If

they are a “record”, then his application will continue under s. 278.92 to determine whether they are admissible as evidence at trial. If they are not a “record”, the application terminates, and the text messages will be subject to the usual evidentiary rules of admissibility at trial.

[2] Mr. Amin says these text messages are not records and the usual rules of evidence apply to them. They have not been disclosed to the Crown or the complainant.

[3] The Crown argues, based on the summary of the text messages provided by Mr. Amin’s counsel, that he is required first to establish the relevance of the text messages. The Crown further argues the text messages are “records,” meaning this application should continue under the process set out in s. 278.92.

[4] In the following, I will briefly describe the purpose of the record screening regime set out in s. 278.92 of the *Criminal Code*, the process to be followed in determining whether the text messages are records. I will then provide my analysis and ruling on the facts of this application.

[5] It is agreed that the text messages are not caught by s. 276 – i.e. they do not qualify under “other sexual activity” so do not become part of the record screening regime in that way. My analysis below will be restricted to s. 278.92.

Brief Conclusion

[6] I find that the text messages are not “records” under s. 278.1 and therefore the record screening regime does not apply.

Purpose of the record screening regime

[7] Parliament introduced new provisions into the *Criminal Code* in 2018 to protect the interests of complainants in sexual assault proceedings in their own private records

when the accused possesses them and seeks to introduce them at trial. These provisions are an exception to the general rule that the defence is not required to disclose records they intend to use in cross-examination of a witness. Under s. 278.92, if the complainant has a reasonable expectation of privacy in the records intended to be used by defence on cross-examination, the defence must bring an application before trial for a ruling on the admissibility of these records. The provisions "create procedures and criteria to assist the judge in deciding whether the records should be admitted, balancing the rights and interests of the accused, the complainant, and the public" (*R v JJ*, 2022 SCC 28 ("*JJ*") at para. 3). The accused must have the right to a fair trial, the complainant's dignity, equality and privacy must be protected, and the public has an interest in the search for truth.

[8] The amendments were a response to practices that had developed in sexual offence trials of defence counsel using private records of the complainant to attack their character. They are a recognition that the dignity and privacy interests of the complainants need protection, and that barriers to complainants coming forward with their complaints need to be reduced, by not allowing sexual offence trials to re-victimize or humiliate them. (*JJ*, at paras. 1 and 139; *R v McKnight*, 2019 ABQB 755 at para. 27.)

[9] The record screening regime requires judges to weigh the potential prejudice of the proposed evidence, including whether it is unjustifiably intrusive on a complainant's privacy, against its probative value. It is not intended to prevent an accused from adducing relevant and material evidence whose probative value outweighs its prejudicial effects.

Process under s. 278.92

[10] An application under s. 278.92 has two stages. At Stage One, which involves only the accused and the Crown, there is first a determination of whether the proposed evidence meets the definition of "record" in s. 278.1. Is it personal information for which there is a reasonable expectation of privacy? If it is found to be a record as defined, the judge then determines whether the evidence is capable of being admissible at trial, based on the tests and factors in s. 278.92(2)(a) and (b) and s. 276, if relevant, and s. 278.92(3).

[11] If the record is found to be capable of being admissible, the Stage Two hearing proceeds. The judge decides whether the proposed evidence meets the test for admissibility in accordance with the factors in s. 278.92(2). It is admissible if it "is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (para. 32 *JJ*). The complainant may make submissions at the Stage Two hearing.

[12] The matter before the Court is the threshold determination at Stage One of whether the proposed evidence is a record under s. 278.1. This includes enumerated and non-enumerated records. Enumerated records are: medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social services records, and personal journals and diaries. Non-enumerated records are those that contain "personal information for which there is a reasonable expectation of privacy," and include electronic communications. The text messages sought to be admitted as evidence in this case are non-enumerated records.

[13] Mr. Amin's counsel has brought this question before the Court in the form of a motion for the Court's directions on whether the text messages are records subject to the record screening regime. She says this is not part of the Stage One hearing, and asks the Court to follow the process set out in *R v AM,* 2020 ONSC 1846 ("*AM*") and followed in other cases such *R v Fairley*, 2021 ONSC 2934 ("*Fairley*") and *R v NK*, 2022 NSSC 81 ("*NK*").

[14] These cases predate *JJ*. The Supreme Court of Canada in *JJ* addresses motions for directions such as the one requested here as follows:

> [103] In light of the uncertainty regarding the scope of records, some defence counsel have on occasion brought a motion for directions before engaging in the procedure under ss. 278.92 to 278.94, to determine whether the particular evidence comes within the definition of a "record" under s. 278.1. **Motions for directions are not explicitly contemplated by the statutory language of the record screening regime: they are purely a discretionary exercise of the presiding judge's trial management power.**
>
> [104] The test we have articulated for interpreting s. 278.1 is designed to assist counsel and judges in reducing the need for motions for directions. However, in cases where the accused does bring a motion for directions, the presiding judge must decide whether the proposed evidence is a "record". Where, in the opinion of the judge, the evidence is clearly a "record", the judge should deal with the matter summarily and order the accused to proceed with a private record application. Equally, where the judge is uncertain whether the proposed evidence is a "record", they should instruct the accused to proceed with an application. **Only if the judge is clearly satisfied that the proposed evidence does not constitute a "record" should they direct that the accused need not bring an application.**
>
> [105] In deciding the motion for directions, we are of the view that the presiding judge retains the discretion to provide notice to complainants and allow them to participate. This discretion is available to the judge because the motion for

> directions itself involves an exercise of the trial management power. [emphasis added].

[15] In this case, I will decide on the basis of the motion for directions brought by counsel for Mr. Amin, taking into account the factors set out in *AM*.

[16] I have determined it is not necessary to give notice to the complainant at this stage. The legislative scheme contemplates the complainant's participation once the information in question has been determined to be a record. If the information is determined not to be a record, then the participation of the complainant before that stage may prejudice the right of the accused to a fair trial. If the information is found to be a record, then the complainant will have participatory rights at Stage Two, including the ability to see the proposed evidence.

[17] In this case, the Crown has made thorough submissions on the summary of the evidence provided by defence counsel, in support of a finding that the text messages are records subject to the record screening regime.

[18] I have had the benefit of reviewing the text messages, which have been included in the application by defence counsel in a sealed affidavit.

Analysis

[19] The question to be decided is whether the text messages proposed to be adduced in evidence by Mr. Amin contain personal information about A.G. for which there is a reasonable expectation of privacy.

[20] I reject the Crown's argument that there is a requirement for Mr. Amin to establish the relevance of the information to the issues at trial at this stage. This is a determination of whether the record screening regime applies to the information. The first question is whether the material is in fact a record subject to the regime. The

relevance of the material to the issues at trial is determined at a later stage, if it is found to be a record under s. 278.1, when contemplating its admissibility at trial.

[21] The evidence summarized by the defence and provided to the Crown is as follows: four pages of text messages between one of the complainants, A.G., and an individual, X.X., who was a friend of both Mr. Amin and A.G. It was not a group chat. There were no photographs, only words and emojis, exchanged between June 12 and June 22, 2020. X.X. provided them directly to Mr. Amin by way of screen shots, for potential use in his criminal trial. Nothing in the text messages from A.G. asked that the information be kept private or not be shared. X.X. did not tell A.G. that they would keep the communications private. Mr. Amin does not know if A.G. is aware the text messages were given to Mr. Amin by X.X. Counsel for Mr. Amin says no information in the texts could be considered to be included in the enumerated records in s. 278.1, or could constitute other sexual activity under s. 276.

[22] Having reviewed the text messages, I find this summary to be accurate.

[23] Counsel for Mr. Amin says the purpose of adducing this evidence is not to cross-examine the complainant about why she did not report the sexual assaults to a third party. Instead, the purpose is to show inconsistencies between that evidence and the trial testimony of the complainant.

[24] The Crown further notes that the defence purpose appears to be impermissible as it is an attempt to show the complainant's failure to report the alleged sexual assault right away. The Crown also focuses on the fact that the complainant wrote the texts in a one-on-one communication with a third party, not the accused. This enhances the complainant's reasonable expectation of privacy vis-à-vis their use at trial, unlike the

situation where the recipient is the accused and it may be less reasonable to expect that communications may not be used in his defence at trial. The fact that X.X., the recipient, sent a screen-shot of the texts to the accused for his use at trial, without the consent of the complainant, suggests an infringement on the complainant's expectation that the communications would not be used by someone else, in this case, the accused, for another purpose (*R v WM*, 2019 ONSC 6535 ("*WM*") at para. 46).

[25] The Supreme Court of Canada in *JJ* defined a non-enumerated record under s. 278.1 as one containing "information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological, or emotional well-being. Such information will have implications for the complainant's dignity" (at para. 54).

[26] The determination of whether something is a record requires a consideration of its content and context. It is a fact specific inquiry and is not based exclusively on whether there is a risk of further dissemination of the texts, or on who controls the information. The totality of the circumstances must be taken into account.

[27] A useful approach in assessing content is to compare it to that contained in an enumerated record. For example, details of the complainant's own medical history would be information over which they have a reasonable expectation of privacy because it is similar to the medical or psychiatric records in the enumerated records definition. However, "mundane information" such as general biographical information, information about everyday occurrences, or general emotional states, would be unlikely to attract a reasonable expectation of privacy (*JJ* at paras. 55-56).

[28] The consideration of context requires the application of a normative and common-sense approach – meaning that the question of whether a person reasonably

expects privacy is to be answered in light of the norms of conduct in our society (para. 57 *JJ* quoting from *R v Jarvis*, 2019 SCC 10 at para. 68). The Supreme Court of Canada suggested three contextual factors in the analysis of reasonable privacy expectation:

a. why did the complainant share the private information – was it with the intention of being used for a specific purpose?

b. was the relationship between the complainant and the recipient one of trust or authority, and can the sharing of the information further be considered to be a breach of that trust or authority? It is not always necessary to have a relationship of trust in order to establish a reasonable expectation of privacy;

c. how was the record created or obtained and where was it shared? For example, one-on-one communication is more likely to create a reasonable expectation of privacy than a communication created or obtained in the public domain or which is able to be accessed by multiple people. Even if information is not perfectly private, further dissemination of it, especially in court proceedings may give rise to a reasonable expectation of privacy.

[29] Here, the content of the texts does not include anything that resembles any of the enumerated records (listed above in para. 12). It is an acknowledgement by the complainant to X.X. of information that was already known to them and others. This information is not private. The expressions of the complainant's feelings in the text messages towards X.X. do not amount to a revelation of core biographical information or highly personal or intimate information. While these expressions of feelings may

create subjective feelings of privacy, they are closer to a description of a general emotional state than to a description of feelings integral to A.G.'s dignity.

[30] The context includes the facts that the text messages are one-on-one communications, between two friends, for the purpose of the complainant expressing her feelings to her friend about information not being shared with her. This context suggests that the complainant may have a reasonable expectation that the communications would not be used for another purpose, such as the trial of Mr. Amin. However, there was no indication that A.G. asked X.X. not to disseminate it, and, more importantly, she knew that X.X. remained friends with Mr. Amin. There was no indication that X.X. promised to keep the exchanges private. Mr. Amin received the messages from his friend, X.X. He did not access them surreptitiously although he did receive them without the consent of A.G.

[31] Courts have said the risk that the receiver of the messages will reveal it to others without consent of the sender is part of assessing reasonable expectation of privacy but is not determinative of its existence (*Fairley* at para. 10; *WM* at para. 47; *R v JK*, 2021 ONSC 7604 at para. 25; *NK* at para. 50). This assessment may also change depending on whether the communications are directly with the accused, or to the Crown who then discloses it to the accused, or to another third party who provides it to the accused, as in this case.

[32] These contextual factors must be balanced with the content of the information, all considered in the totality of the circumstances. As noted by the Supreme Court of Canada in *JJ* at para. 53:

> In our view, s. 278.1 presupposes that a certain level of privacy must be engaged; namely, this provision concerns

> only records that could cause "potential prejudice to the complainant's personal dignity." These factors suggest that the scheme is not intended to catch more mundane information, even if such information is communicated privately. Moreover, given the accused's right to make full answer and defence, mere discomfort associated with lesser intrusions of privacy will generally be tolerated. In this context, a complainant's privacy in open court "will be at serious risk only where the sensitivity of the information strikes at the subject's more intimate self" (*Sherman Estate*, at para. 74).

[33] In this case, as noted above, the information does not strike at the heart of the complainant's intimate self or personal dignity. It is not new or unknown information either to the recipient or to others within their group of friends and colleagues. She knew the recipient was also a friend of Mr. Amin, and their friendship was ongoing. Her friendship with the recipient was not long-standing. While she may have some discomfort at the dissemination of the information, created by the one-on-one text communication to a friend, in the totality of the circumstances, including the accused's right to a fair trial, this is not sufficient for the communications to constitute a record for the purpose of s. 278.1.

Conclusion

[34] The text messages sought to be introduced by defence on cross-examination of A.G. do not meet the definition of "record" in s. 278.1. As a result, a hearing under s. 278.92 will not be necessary.

[35] The material filed on this application, including the sealed text messages

attached to the affidavit of Jennifer Cunningham, will remain on the file for the purposes of any appeal.

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DUNCAN C.J.