

SUPREME COURT OF YUKON

Citation: *R v Amin*,
2023 YKSC 37

Date: 20230626
S.C. No. 20-01515
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

RESPONDENT

AND

RUDRA PULASTYAKUMAR AMIN

APPLICANT

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*.

Publication of any document, or broadcast or transmission in any way of an application made, evidence taken, information given, representations made or the decision of a judge, unless ordered otherwise, under ss. 278.93 or 278.94 of the *Criminal Code* is prohibited pursuant to s. 278.95 of the *Criminal Code*.¹

Before Chief Justice S.M. Duncan

Counsel for the Respondent

Faiyaz Alibhai

Counsel for the Applicant

Jennifer Budgell

Counsel for the Complainant

George Filipovic

REASONS FOR DECISION

Overview

[1] The accused is charged with seven counts of sexual assault of three complainants. The trial of this matter was held October 3-13, 2022, and a mistrial was

¹ The publication bans do not apply to the complainant, Michelle Palardy.

declared on October 14, 2022, after an improper closing address to the jury by the Crown. The new trial is set for July 31-August 8, 2023.

[2] This is an application by the accused under s. 653.1 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Criminal Code*"), for a decision that it would not be in the interests of justice for the parties at the retrial in this matter after the mistrial to be bound by the earlier Court ruling that the love letter written by one of the complainants, Michelle Palardy, to the applicant is inadmissible. The applicant says his evidence and the evidence of Michelle Palardy at trial are sufficient to rebut the presumption that pre-trial rulings are binding on the parties at the retrial after a mistrial.

[3] The Crown opposes the application. They say the applicant's argument is not new, nor was there any new evidence at trial that demonstrates it is not in the interests of justice that the prior ruling should bind the parties at the new trial.

[4] Counsel for the complainant, Michelle Palardy, also provided submissions. The preliminary issue of his standing to do so was raised by the applicant. This will be addressed first below. The complainant's arguments under s. 653.1 were similar to those of the Crown.

[5] Submissions were made by all counsel on the merits of the underlying application brought under s. 278.92 requesting leave to allow the applicant to cross-examine the complainant Michelle Palardy on the contents of the love letter she wrote and sent to him in March or April 2018, before the alleged assaults occurred.

[6] I conclude that the complainant's counsel has standing to make arguments under s. 653.1. I conclude that the applicant has not met the test under s. 653.1 for relitigation

of the pre-trial ruling as he has not persuaded me that it would not be in the interests of justice to have that ruling apply.

Background

[7] Approximately two weeks before his jury trial was scheduled to start, the applicant brought an application under s. 278.92 to determine the admissibility of certain documents in his possession: text messages between two of the complainants and between one of the complainants and the applicant's fiancé. This was scheduled to be argued on the first day of trial because no other time was available. On October 3, 2022, the first day of trial, the applicant requested the Court also consider the admissibility of Michelle Palardy's handwritten love letter under s. 278.92. Over Crown objections for lack of notice, the Court allowed the applicant to provide written notice that day by email and further allowed argument to proceed that day and the following day if required. An email from the applicant to Crown counsel and counsel for the complainant explaining the basis for the application served as the notice of application.

[8] The Court ruled that the handwritten love letter was inadmissible at trial. The judge found it was relevant but had low probative value. She further found it was private and personal for the complainant and this prejudice outweighed the letter's probative value. Defence counsel was permitted to refer at trial to the fact that the letter had been written in March or April 2018 after their breakup and that she said in the letter that she loved and missed him.

[9] At trial, the complainant and the applicant testified.

[10] On October 14, 2022, a mistrial was declared because of the improper closing address to the jury by the Crown.

[11] The applicant says relitigation is warranted because of the new evidence at trial. The new evidence provides a new argument that the letter's contents are relevant to an assessment of Michelle Palardy's credibility related to her description of their relationship and her feelings for him at its end and beyond.

Issues

[12] The first issue is the standing of the complainant's counsel to make submissions under s. 653.1.

[13] Next, I will determine whether the applicant has satisfied the test under s. 653.1.

[14] I decline to address the arguments under s. 278.92, given my conclusion that the test for relitigation is not met.

a) *Standing of counsel for complainant under s. 653.1*

[15] The applicant objects to counsel for the complainant's submissions under s. 653.1 on the basis that they have no standing. Section 653.1 states that pre-trial rulings are binding on the parties unless it would not be in the interests of justice. The parties are the Crown and the applicant, not the complainant. The argument under s. 653.1 does not specifically include consideration of the interests of the complainant. These interests will be engaged if permission to relitigate the ruling is granted.

[16] The Crown notes that s. 653.1 does not restrict submissions to the parties to the proceedings. The Crown further states that the complainant is not a party to the proceedings at any time, even when she is granted standing to make submissions under s. 278.92. Under s. 278.94, she may choose to make submissions and in this case she did. The Crown states it is consistent and appropriate for all who made

submissions in the original ruling to make submissions under s. 653.1, as their interests are affected if relitigation is permitted.

[17] The complainant provided a 1995 Supreme Court of Canada case that addresses the standing of other parties in third party appeals. I agree with the applicant's counsel that it is not relevant to this fact situation. The complainant also pointed out the highly discretionary nature of the process under s. 278 applications as set out in the leading case of *R v JJ*, 2022 SCC 28 (para. 105), because they involve the exercise of the trial management power. The complainant suggested the Court exercise its discretion here and allow the complainant to participate, given the decision's effect on her – that is, the potential relitigation of the application.

[18] Counsel could not locate any case addressing a complainant's standing in the context of an argument under s. 653.1 where the underlying application is under s. 278.92.

[19] The complainant participated fully in the argument on the admissibility of the love letter at the outset of the first trial. The determination under s. 653.1 includes an assessment of whether there is now new evidence and new argument; the nature of the evidentiary record on which the prior ruling was made; the nature of the issues in the prior ruling and the proposed relitigation; and any other circumstances. The complainant's submissions on these issues are relevant and helpful in making this assessment because of their involvement in the argument on the issues at the first application, as well as their knowledge of the new evidence on which the applicant relies. There is nothing in s. 653.1 that limits who is able to provide submissions; the limitation is on whom the ruling is binding.

b) Has the test under s. 653.1 been satisfied?

Legal test

[20] Section 653.1 provides:

In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made – or could have been made – before the stage at which the evidence on the merits is presented.

[21] All counsel agree that the decision of *R v Victoria*, 2018 ONCA 69 (“*Victoria*”), is the leading case interpreting this section. Its purpose was described by the Ontario Court of Appeal as a “parliamentary determination to limit or minimize the consequences of a mistrial on court resources by restricting relitigation of certain issues determined in the prior proceedings” (*Victoria* at paras. 48-49). The section takes its meaning from context and is characteristic of the existence of a judicial discretion to be exercised on a case by case basis. It creates a presumption in favour of preserving certain rulings made before or during the first trial when proceedings are recommenced after a mistrial. The presumption is rebuttable upon the court’s satisfaction it would not be in the interests of justice for the previous ruling(s) to be binding on the parties. In *Victoria* at para. 55, the Court of Appeal said that in making this determination, courts should consider the following factors:

- i) whether any new evidence will be tendered on the proposed rehearing;
- ii) whether any new arguments will be advanced on the proposed rehearing and the apparent merit, if any, of those arguments;

- iii) the interests of the parties, including any articulable prejudice fostered or perpetuated by the inability to relitigate any issue previously decided;
- iv) the public interest in the timely and efficient conduct of criminal trial proceedings and avoidance of unnecessary and duplicative proceedings;
- v) any changes in the legal principles governing the ruling on which relitigation is proposed;
- vi) the nature of the evidentiary record on the basis of which the prior ruling was made, for example, *viva voce* testimony; agreed statement of facts; transcripts of testimony given elsewhere and any differences in the record proposed for relitigation;
- vii) the nature of the issue(s) involved in the prior ruling and proposed relitigation;
- viii) the possibility of inconsistent rulings; and
- ix) any other circumstances relating to the balance of the subsequent trial proceedings that may have an impact on the continued applicability of the prior rulings.

Ruling on first pre-trial application

[22] Wenckebach J. found that the letter did not contradict the police statement, as in that statement the complainant described the relationship as good at the beginning. The letter provided a description of the complainant's feelings about the relationship at the time she wrote the letter. The judge ruled that although the letter was relevant it did not have sufficient probative value to warrant admissibility. She did not accept the defence submission that the letter could significantly advance the applicant's theory that Michelle Palardy experienced the relationship as overwhelmingly positive. The judge found that the letter and the police statement provided some potential for establishing inconsistencies. She went on to find that the letter was "very private for Ms. Palardy,

and the prejudice to her privacy rights and dignity would be high if it were to be admitted at trial” (*R v Amin*, 2023 YKSC 7 at para. 67 (unreported)). It was ruled inadmissible under s. 278.92.

Applicant’s arguments

[23] The applicant argues that the evidence at trial from the complainant and himself is new evidence and provides a basis for new argument. As well, it constitutes a different evidentiary record. This rebuts the presumption it is not in the interests of justice to rely on the previous ruling.

[24] In the application before Wenckebach J., the applicant argued that the complainant’s letter contradicted her characterization of the relationship provided in her police statement of June 17, 2020, and in her trial preparation interview with the Crown. In the police statement, the applicant said the complainant focussed on the period after the breakup, claiming she only hung out with him because he pressured her to do so. In the Crown interview, she described how he became jealous, controlling, and critical of her after a few months of dating. This was new information about the pre-breakup period of their relationship. In contrast, Michelle Palardy wrote in the letter how it is hard not having him in her life at all; it will never be the same without him around; and that she will always love him. She thanks him for the great memories. The applicant argued that this letter, describing what the complainant was feeling at the time (around March/April 2018) contradicts the characterization of the relationship described in her police statement and her interview.

[25] The applicant further argues that the evidence at trial provides clarification under oath that was not available at the first hearing. The trial evidence supports the

overwhelmingly positive sentiments about their relationship expressed by the complainant in the letter. Specifically, the applicant at trial testified that he and the complainant remained friends after their breakup even though they were seeing other people. The applicant asks this Court to infer from the complainant's letter that in the months and years following the letter, the complainant maintained an overwhelmingly positive relationship with the applicant, including the occasions on which they had consensual sexual relations, supporting the evidence of the applicant. It was only when she discovered in June 2020 that he had been dating other women during their relationship that she recharacterized their relationship as negative.

[26] The applicant says his argument now is narrower than it was before *Wenckebach J.* The use of the letter at trial would be restricted to a determination of the complainant's credibility – that is, whether her evidence that she did not want to spend time with the applicant after their breakup and only did so because she felt pressured, can be believed. If she is not believed on this point, then what other parts of her evidence cannot be believed?

Crown's argument

[27] The Crown argues that the new evidence relied on by the applicant is the same as that relied on for the first ruling. The evidence at trial relied on is described as follows by the applicant in his notice of application at para. 30:

At trial, Michelle Palardy testified that she dated the Applicant for about six months, from September 2017 to March 2018. She told the jury that as the relationship went on, the Applicant became controlling and jealous. According to Ms. Palardy, the Applicant tried to control what she did, what she wore, and who she could hang out with. Ms. Palardy testified that the Applicant also made comments about her weight. After she and the Applicant

broke up in March 2018, they stayed in touch off and on until April 2019.

[28] Similar facts were relied on at the first pre-trial application as noted from the following quotes from the first hearing.

[29] The Crown read from Michelle Palardy's police statement made on June 17, 2020:

MR. TSAI: Right there:

But he would just take that, he would pick on you. He would like you're selfish and, you know, you don't give me time and priority and he would just start making me feel bad about yourself like you're fat, you're ugly. Just like all those words, right. (as read)

187 Again, like you just keep crying and texting me like you're selfish, you're selfish. I just don't even know the words. He would just like - he mentally abused me, just like mentally. (as read)

[30] The defence counsel argued:

Now we know, and I don't think my friend disputes this, in her recent interview she talks about how things turned within a couple of months. I believe she says, "Within a few months of dating, he got jealous and controlling". She makes mention for the first time of how he would – he came into work one day and thought she was dressed inappropriately and gave her a look, would – didn't want her hanging out with other people and so on. So we now have more information about the early stages of the relationship which she is now describing as – in a negative light.

[31] The Crown states that the arguments the applicant makes now are the same.

The following summarizes the current argument of the applicant from para. 15 of his notice of application:

... The letter is relevant and highly probative of Ms. Palardy's feelings towards the Applicant around the time of their breakup in March/April 2018. Importantly, it contradicts her

evidence that the relationship, in an overall sense, was negative. The Applicant's position is that Ms. Palardy maintained positive feelings toward the Applicant at the time of the breakup and throughout the months and years that followed, until she learned in June 2020 that he had been unfaithful.

[32] At the first pre-trial application, the applicant argued:

So this very loving, effusive letter where she's expressing her feelings towards him. Obviously, it's relevant to show that the way she characterizes the relationship now or as of June 2020 up to the present day in a very negative light, you know, almost everything about the relationship as she tells the police and as she told the Crown more recently was negative from start to finish, this casts a different light on the relationship. And the existence of the letter suggests that, you know, she's now in hindsight re-characterizing the entire relationship as a negative one.

Why? Because she found out or confirmed finally to herself in June 2020 that Mr. Amin had cheated on her. That's the source of her animus towards Mr. Amin and the re-characterization of the entire relationship.

So obviously, it's important to confront her with this letter which expresses her real-time feelings as of March or April of 2018.

[33] Although the evidentiary record has changed to include the trial testimony, the Crown states the essential facts are the same as those relied on in the first pre-trial hearing.

[34] The Crown states that the applicant's position that his argument now is narrower does not mean it is a different argument. It is an acknowledgment that the same argument was made at the first hearing and only part of it is being advanced now.

[35] Both parties addressed the other factors in *Victoria*; however, the main issue to be decided here is whether the new evidence and arguments from the evidentiary record at trial rebut the presumption. The other factors will be addressed briefly below.

Complainant's argument

[36] The complainant's arguments were similar to those of the Crown. She added other examples of how the new evidence relied on at trial was the same as the evidence relied on at the pre-trial application.

Analysis

[37] I agree with the Crown and complainant that the evidence at trial relied on by the applicant is not materially different from that relied on at the first pre-trial application. While the complainant's testimony at trial was under oath, as opposed to unsworn statements provided to police and the Crown, and the applicant also testified at trial, there is nothing substantively new. The issue raised by the applicant is whether the complainant can be believed when she stated the relationship had negative aspects to it a few months into it, and that she felt pressured to hang out with the applicant after March/April 2018. Both at trial and in her statements before trial she talked about the applicant's jealous, controlling, and mentally abusive behaviour during the relationship. At trial, she stated that she only spent time with the applicant after March/April 2018 "to make him happy". But she also testified at trial that sometimes she did want to spend time with the applicant during the post-breakup period. She also testified in examination in chief and cross-examination that after their relationship ended they reconciled and were friends again.

[38] As noted by Wenckebach J. in her decision on the Stage 2 analysis under s. 278.92 (*R v Amin, 2023 YKSC 7* (unreported)) at paras. 63-66:

On the one hand, I agree that the evidence [i.e. the love letter] is relevant. Ms. Palardy is not clear about timeframes in her police statement, and so she could be challenged

about whether she paints a different picture of the relationship in her police statement than in the letter.

On the other hand, its probative value is low. Contrary to Mr. Amin's position, Ms. Palardy's statement does not contradict the letter. Ms. Palardy does say, in the police statement, that the relationship was happy at the beginning, and then, later, that Mr. Amin did not treat her well. However, she does not specifically state that at the end of the relationship she disliked Mr. Amin or felt that the relationship had been bad from beginning to end. The police statement does not directly contradict the letter, but rather, presents some potential for establishing inconsistencies.

The extent to which the police statement is inconsistent with the letter also depends on the inferences that can be drawn from it. In the letter, Ms. Palardy describes her feelings using only broad terms and makes reference to general "good memories". It does not provide strong evidence that Ms. Palardy experienced the relationship as overwhelmingly positive.

Moreover, it is a statement made at one moment in time, when Ms. Palardy is reflecting back on the relationship. It demonstrates what Ms. Palardy felt at the time she wrote the letter, but is less helpful in showing how Ms. Palardy experienced the relationship as she lived it.

[39] The new evidence at trial does not change this analysis. In fact, there is further evidence from the complainant at trial that supports the applicant's evidence at trial that they remained friends after the breakup. This is arguably consistent with the sentiments in the letter. The letter's probative value remains limited. As noted by Wenckebach J. at para. 66, the letter is evidence of the complainant's views as she reflected on the relationship at the time she wrote the letter in March/April 2018. The applicant asks the Court to draw an inference from the letter that the complainant had an overwhelmingly positive view of the relationship in the months and years that followed. Wenckebach J. addressed this argument in part at para. 66, as well as in para. 65 with her conclusion

that the letter did not provide strong evidence that Michelle Palardy experienced the relationship as overwhelmingly positive. There is insufficient evidence or information on which an inference can be drawn about her feelings in the months and years that followed.

Interests of the parties, including articulable prejudice fostered by the inability to relitigate any issue previously decided

[40] Given my finding that the evidence at trial does not change the evidentiary basis for the decision or the legal arguments made at the first pre-trial application, there is no prejudice to the applicant of not relitigating the issue. The applicant can raise the issue on appeal.

Public interest in timely and efficient criminal trial proceedings and avoidance of unnecessary and duplicative proceedings

[41] Given my finding that the evidence and argument are not materially different, it would be duplicative and inefficient to rehear this application.

Any changes in the legal principles governing the ruling

[42] Counsel agree that the legal principles governing the admissibility of the evidence have not changed since the first ruling.

Nature of the evidentiary record

[43] As noted above, the evidentiary record has been supplemented by the evidence at trial, but this testimony did not change the factual basis or the legal argument.

Nature of the issues involved in the prior ruling and the proposed relitigation

[44] The applicant argued that the new issue in the proposed relitigation is whether Michelle Palardy's evidence that she did not want to see the applicant anymore and only spent time with him because he would not leave her alone after the breakup can be

believed. The applicant argues the letter supports his position that she had a positive relationship with him for years after the breakup and her feelings only changed in June 2020 when it was confirmed to her that he cheated on her during their relationship.

[45] I disagree that the applicant's articulation of a credibility determination rather than whether her characterization of the relationship changed is a material difference. The issue is the same now as it was before Wenckebach J. The applicant seeks to introduce the love letter to show Michelle Palardy's positive feelings about the relationship.

Michelle Palardy did state in the police statement, the interview, and at trial that there were happy times during the relationship and they were friends after the breakup. She also stated there were negative aspects to the relationship. There are no new issues now that were not raised or addressed in the first application.

Risk of inconsistent rulings

[46] Given my finding that the evidence, arguments, issues, and evidentiary record are materially similar, there is a possibility of inconsistent rulings.

Conclusion

[47] For the above reasons, the applicant has not satisfied me that it is not in the interests of justice to have the pre-trial ruling binding at the retrial. The application is dismissed.

DUNCAN C.J.