

SUPREME COURT OF YUKON

Citation: *R v Amin*,
2023 YKSC 7

Date: 20230222
S.C. No. 20-01515B
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

RUDRA PULASTYAKUMAR AMIN

Before Justice K. Wenckebach

Counsel for the Crown

Somboun Tsai

Counsel for the Defendant

Jennifer Budgell

Counsel for the Complainant Michelle Palardy

George Filipovic

Counsel for the Complainant A.G.

John D. Cliffe, K.C.
(by videoconference)

**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] The accused, Rudra Amin, is charged with seven counts of sexual assault against three complainants.¹ He has made two applications under s. 278.92 of the *Criminal Code*.² In the first application, he seeks a finding that two sets of texts are

¹ At the time this application was heard, Mr. Amin was charged with five counts of sexual assaults. The indictment was later amended.

² R.S.C., 1985, c. C-46 (the "*Criminal Code*")

admissible at trial. In the second application, he seeks a finding that a love letter is admissible at trial. The Crown and complainants oppose the applications.

[2] A number of issues arise in the applications, some of which are best understood in light of the procedural history.

BACKGROUND

[3] Previously, Mr. Amin applied for disclosure of text and social media messages the complainants sent each other, pursuant to s. 278.2 (commonly known as a “*Mills* application”). On December 13, 2021, the Court ordered that some of those texts be produced to Mr. Amin.

[4] On September 16, 2022, approximately 2.5 weeks before the start of the trial, Mr. Amin filed his s. 278.92 application on the admissibility of two sets of text messages. The first set were the texts that had been produced to Mr. Amin through the *Mills* application and were texts between two complainants, Michelle Palardy and A.G. (the “Palardy-A.G. texts”). The second set were texts between A.G and Mr. Amin’s girlfriend, Anjali Bali (the “A.G.-Bali texts”).

[5] Section 278.92 applications proceed in two stages. The first involves only the accused and the Crown (“Stage One”). If the application meets certain legislative requirements, it proceeds to the second stage hearing (“Stage Two”). At Stage Two, the complainant also has standing.

[6] In the case at bar, the hearing of Stage One was set for the first day of trial, as neither the Court nor the Crown was available for a hearing before then.

[7] At the Stage One hearing, Mr. Amin’s counsel sought to bring an additional s. 278.92 application about a love letter from Ms. Palardy to Mr. Amin. She did not provide written notice.

[8] These facts give rise to issues about notice requirements and whether a s. 278.92 application is required with regard to the Palardy-A.G. texts, in addition to the other considerations of a s. 278.92 application.

ISSUES

[9] The issues, then, are as follows:

1. Should the s. 278.92 application about the letter be heard?³
2. Is a s. 278.92 application necessary to determine the admissibility of the Palardy-A.G. texts?

Stage One

3. Are the texts and letter “records” pursuant to s. 278.1 of the *Criminal Code*?
4. Are the texts and letter capable of being admissible at trial?

Stage Two

5. Are the texts and letter admissible at trial?

RULINGS

[10] Given the time constraints, I made rulings with reasons to follow. First, I allow the application about the letter to proceed. Second, I conclude that the s. 278.92 application is necessary with regard to the Palardy-A.G. texts. Furthermore, I conclude that the

³ The determination of whether a s. 278.92 application meets the notice requirements is a part of Stage One. In this case, however, it is more logical to deal with this issue separately from the substantive analysis.

Palardy-A.G. texts and the letter from Ms. Palardy to Mr. Amin are records, but that the set of A.G.-Bali texts is not a record pursuant to s. 278.1.

[11] Stage Two thus proceeded with regard to the Palardy-A.G. texts and the love letter. I find the texts are admissible at trial and the love letter is not admissible at trial.

ANALYSIS

1. *Should the s. 278.92 application about the letter be heard?*

[12] The s. 278.92 application about the love letter may proceed.

[13] A s. 278.92 application must be made in writing and must be provided to the prosecutor and clerk of the court at least seven days in advance of the hearing, although the court has the discretion to shorten the time requirements.⁴

[14] It is uncontested that Mr. Amin's application, at the time it was brought, did not meet the legislative requirements: notice was provided only orally and without providing seven days' notice. The Crown submitted that the application should not be heard.

[15] Despite the deficiencies in the application, I permitted defence counsel to provide written notice to the other parties overnight, to allow some argument to proceed that day and to permit the parties to provide additional submissions over the following days.

Mr. Amin's lawyer sent an email to Ms. Palardy's lawyer outlining the reasons for the application. This was filed with the court and served as notice of the application.

[16] I made this decision because, in my opinion, the deficiencies in the application could be remedied without undue prejudice to the complainants or the administration of justice.

⁴ *Criminal Code*, s. 278.93(2)

[17] The communication was a half-page document. While the arguments about whether it is a record is based on new law emanating from *R v JJ*,⁵ the Crown had prepared arguments about other records on this issue, which would not be difficult to apply to the letter. The Stage Two argument, should it get that far, is also not unduly complicated.

[18] As well, the arguments Mr. Amin made about relevancy were largely the same in the *Mills* application as on this application. Thus, complainants' counsel were well aware of the basis upon which Mr. Amin was bringing his application. While inconvenient to Crown and complainants' counsel, they could adequately prepare for the hearing. Given that a jury had been empanelled, and was waiting to commence the trial proper, this process allowed Mr. Amin to make his application, the other parties to respond, and the jury trial to proceed.

[19] Although the application did proceed, these problems could have been avoided had Mr. Amin filed his notice of application in a timely and complete fashion. Having the application in writing is essential. It provides the information the Court needs to apply the statutory test. It also provides the complainant, who does not attend the first stage of the application, all the necessary information to respond to the application at the second step.

[20] Moreover, the difficulties in hearing this application were compounded because Mr. Amin did not file his first s. 278.92 application until a little over two weeks before the trial was to commence. This did not provide sufficient time to schedule two stages of

⁵ 2022 SCC 28 (“*JJ*”)

hearing and accommodate the Crown's, two counsels to the complainants', and the Court's schedules before the start of the trial.

[21] The Supreme Court of Canada has noted that it is preferable to conduct s. 278.92 applications before the trial commences, as mid-trial applications can cause delays, scheduling difficulties, and unfairness to the accused and the complainant.⁶

[22] In order to complete applications before trial commences, defence should, as a general rule, file their applications well in advance of the trial date. The *Criminal Code* provides for a seven-day notice period before the first stage of the application takes place. After the first stage, counsel to the complainant may be appointed, the second stage hearing then occurs, and the court must provide its decision. Section 278 applications can be time-consuming. If defence does not file the application with sufficient time for the application to be completed before the start of the trial, the application may be denied outright or the trial may be adjourned. Alternatively, if the matter proceeds, the interests of the accused, the complainant, and the administration of justice may be poorly served because the application is not given the time and analysis required. It is therefore incumbent on defence counsel to file s. 278 applications in a timely manner.

2. *Is a s. 278.92 application necessary to determine the admissibility of the Palardy-A.G. texts?*

[23] I find that a s. 278.92 application is required.

[24] Although Mr. Amin has brought a s. 278.92 application about the Palardy-A.G. texts, he first seeks a finding that the application is not necessary. The texts were produced to Mr. Amin after a *Mills* application. Mr. Amin submits that an application

⁶ *JJ* at paras. 85-86

under s. 278.92 would duplicate the analysis in the *Mills* application and is therefore redundant.⁷ However, as noted in *R v Martiuk*,⁸ the factors the court must take into consideration in a s. 278.92 application are similar, but not identical, to those in a *Mills* application.⁹ The s. 278.92 is not, therefore, redundant.

[25] Moreover, the concepts of disclosure and production are different than the concept of admissibility: the decision about production, therefore, does not determine the outcome on admissibility.

[26] The application is required to determine admissibility.

Stage One

[27] At Stage One, the court may be required to determine if the documents or communications at issue are “records” pursuant to s. 278.1 of the *Criminal Code*. This issue may arise because the s. 278.92 regime applies only to documents and communications that fall under the definition of record in s. 278.1, which includes both enumerated and non-enumerated records. Enumerated records are: medical, psychiatric, therapeutic, counselling, education, employment, child welfare, adoption and social service records, and personal journals and diaries. Non-enumerated records contain “personal information for which there is reasonable expectation of privacy”. Thus, where an accused applies to adduce evidence from a non-enumerated record, the first consideration is whether it contains personal information for which there is a reasonable expectation of privacy, thereby qualifying as a record pursuant to s. 278.1.

⁷ *R v McFarlane*, 2020 ONSC 5194 (“*McFarlane*”)

⁸ 2022 ONSC 5577 at para. 18

⁹ *Criminal Code*, ss. 278.5(2) and 278.92(3)

[28] If they are not records, then the s. 278.92 regime does not apply and the documents and communications are subject to the ordinary rules of evidence. If they are records, then the court completes the Stage One analysis by considering whether the evidence is capable of being admissible under the regime.

[29] In the case at bar, the texts and letter are non-enumerated records. I must therefore consider whether they are records pursuant to s. 278.1.

3. Are the texts and letter “records” pursuant to s. 278.1 of the *Criminal Code*?

[30] I find the Palardy-A.G. texts and the love letter are records, but that the A.G.-Bali texts are not.

[31] In *JJ*, the Supreme Court of Canada established the framework for determining when a non-enumerated record is a record under s. 278.1. The Court stated that a record would contain personal information for which there is reasonable expectation of privacy if it contained “information of an intimate and highly personal nature that is integral to the complainant's overall physical, psychological or emotional well-being”.¹⁰ A good indicator that there is a reasonable expectation of privacy in the information is if it is similar to the information contained in an enumerated record.¹¹ On the other hand, records containing “mundane information such as general emotional states, [or] everyday occurrences” are not records for the purposes of s. 278.1.¹²

[32] In determining whether a communication is a record, the court must analyze both the content of the communication and the context in which it was made.¹³

¹⁰ *JJ* at para. 71

¹¹ *JJ* at para. 55

¹² *JJ* at para. 56

¹³ *JJ* at para. 54

The Palardy-A.G. Texts

[33] I find that the texts are records.

[34] Mr. Amin submits that the texts describe only mundane thoughts and feelings, and that the complainants were not in a trust relationship, as they had known each other for a short period of time. Thus, the texts are not records.

[35] The Crown, on the other hand, submits that the texts are records. The Crown submits that they have already been subject to a *Mills* application and the determination about whether they are records was made at that time. Given that the determination has already been made, I cannot revisit the issue now.

[36] The Crown also submits that they are records because in the texts the complainants express deeply personal emotions. Moreover, the relationship of the complainants, which developed into a type of informal support group, supports the conclusion that the texts are a record.

[37] I will first address the argument that the texts are a record because they were determined to be a record in the *Mills* application. This argument bears similarities to Mr. Amin's argument that the s. 278.92 application is not necessary as the texts have already been subject to a *Mills* application. My analysis and conclusion is similar: I reject the Crown's argument and find that a new analysis is required.

[38] As noted earlier in this decision, the purposes of the applications are different. *Mills* applications are brought when the accused is seeking production of records held by third parties. Applications under s. 278.92 are brought to determine the admissibility of records at trial. In *JJ*, the Court stated that the determination about whether a

document contains private information is driven by context.¹⁴ Because context is key to determining the level of privacy attached to records, the privacy interests are different in *Mills* applications from those in s. 278.92 applications. It would therefore be an error to conclude that the texts are a record for this application because they were found to be a record in the *Mills* application.

[39] Turning to the content and context of the texts, in my opinion, the texts do go into information that is highly personal. The complainants first met to discuss their respective relationships with Mr. Amin. Whether, as the Crown states, they discussed being sexually assaulted by him, or whether, as the defence asserts, they learned that Mr. Amin had been unfaithful to them, the result was that the complainants shared intimate details of their experiences with Mr. Amin.

[40] These discussions provide the context for the texts. The texts describe their feelings and thoughts as they continue to process their discoveries about Mr. Amin. They support and affirm each other. Moreover, the texts show that although the complainants have only recently met, it seems they have developed trust in one another.

[41] The content and context of the texts lead me to conclude that they are a record.

The A.G.-Bali Texts

[42] Mr. Amin submits that the texts, which are two short messages between relative strangers, are not a record. I agree.

[43] The content of the texts is brief and non-revelatory. In the first text, A.G. gives a generalized warning to Ms. Bali and states that she hopes Ms. Bali is happy. Ms. Bali

¹⁴ *JJ* at para. 50

responds, saying that she is happy. Neither message contains information that is highly personal.

[44] The context, similarly, suggests a low level of privacy. A.G. did not know Ms. Bali well when she contacted her and could have no expectation that she would keep the message private. Indeed, it would be far more reasonable to expect that Ms. Bali would share the text with Mr. Amin.

[45] I therefore conclude that the A.G.-Bali texts is not a record pursuant to s. 278.1 of the *Criminal Code*.

The Love Letter

[46] Mr. Amin submits that the letter does not contain intimate, personal information, but rather, discusses general emotions and is, therefore, not a record. I disagree.

[47] The letter is short and written after Ms. Palardy and Mr. Amin broke up. In it, Ms. Palardy describes her feelings for Mr. Amin and shares general memories about the relationship. The expression of emotions at the end of a relationship is information that is intimate and of a highly personal nature, even if, as here, the emotions expressed are relatively innocuous.

[48] The context, similarly, suggests that there is a reasonable expectation of privacy attached to the letter. There is a general expectation that a love letter will not be shared with others by the recipient; it would be a betrayal of trust for the letter to be shared. Moreover, the letter is a handwritten note. In an age where communications are rattled off through texts and social media, writing a letter on paper shows deliberation and thought. Additionally, while a letter can be shown to others, it takes more effort than

electronic communications, which can generally be shared with multiple people with a click of a button.

[49] The letter is, therefore, a record pursuant to s. 278.1 of the *Criminal Code*.

4. *Are the texts and letter capable of being admissible at trial?*

[50] Stage One also requires the court to assess whether the evidence is capable of being admissible at trial. The Crown concedes it is, and I agree.

[51] The test for determining if evidence is capable of being admissible at trial is low, requiring only a facial consideration of admissibility.¹⁵ Here the defence states that the text evidence would be relevant in determining whether the complainants were motivated by animus against Mr. Amin, and that the love letter is relevant as it contradicts Ms. Palardy's statement to the police and the Crown. The Palardy-A.G. texts and the love letter thus meet the threshold of Stage One of the application.

Stage Two

5. *Are the texts and letter admissible at trial?*

[52] I conclude that the Palardy-A.G. texts are admissible at trial, but that the love letter is not.

[53] At the second stage of an application pursuant to s. 278.92(2)(b), the court determines whether the evidence 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". Section 278.92(3) sets out specific factors the court must consider when deciding whether the evidence is admissible.

[54] I will first address Palardy-A.G. texts, followed by the letter.

¹⁵ R v Ecker (1995), 96 CCC (3d) 161 at para. 61 (SKCA)

Palardy-A.G. Texts

[55] The s. 278.92(3) factors the parties say are pertinent here are: the right of the accused to make a full answer and defence; whether there is a reasonable prospect the evidence will assist at arriving at a just determination; and the potential prejudice to the complainant's personal dignity and right to privacy.

[56] Mr. Amin submits that the texts are relevant to an issue at trial, because they assist in demonstrating the complainants' animus to him. They show that the complainants were angry at Mr. Amin and that they were concerned about his immigration status and continued presence in Canada. The texts could support Mr. Amin's position that the complainants made allegations of sexual assault about him because they were angry at him for being unfaithful to them. He says that the texts are important to his ability to make a full answer and defence.

[57] The Crown and counsel to the complainants, on the other hand, say that even if the texts may be used to demonstrate animus, they are not necessary for Mr. Amin's defence. The police statements, in which the complainants describe their feelings about Mr. Amin, have all the evidence Mr. Amin needs to make a full answer and defence.

[58] In my opinion, while the police statements contain similar information as is contained in the texts, there are some texts that go further or into more detail than the police statements. These texts are also contemporaneous, showing the complainants' feelings as they are realizing the truth about their relationships with Mr. Amin. They address the issues that are at the very heart of Mr. Amin's defence, and thus, are important to his ability to make a full answer and defence.

[59] Because the texts talk about the complainants' feelings about Mr. Amin, which arose from difficult relationships with him, the use of them at trial does have an impact on the complainants' personal dignity and right to privacy. In balancing the different interests, however, I conclude that the value of the evidence outweighs the prejudice to the proper administration of justice.

[60] I therefore conclude that the texts are admissible at trial.

The Love Letter

[61] Mr. Amin says that the letter is relevant to an issue at trial because, in the letter, which was written shortly after the couple separated, Ms. Palardy describes only positive feelings towards Mr. Amin. Mr. Amin says this supports his theory that the relationship was, in fact, good, but that Ms. Palardy re-cast it in her mind later, after she learned of his infidelities. Mr. Amin also says that the letter contradicts the statement Ms. Palardy gave to police and to the Crown.

[62] I find that Mr. Amin's right to make a full answer and defence would not be harmed if the letter is not admitted as evidence.

[63] On the one hand, I agree that the evidence 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.

[64] 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.

[65] 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.

[66] 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.

[67] However, as a good-bye love letter, as noted above, it would be 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. I therefore find that the letter is not admissible at trial.

CONCLUSION

[68] I allow the application with regard to the letter as well as the texts to proceed. I find that a s. 278.92 application with regard to the Palardy-A.G. texts is necessary, that they and the love letter are records pursuant to s. 278.1 but that the A.G.-Bali’s texts are not. I furthermore find that the Palardy-A.G. texts are admissible at trial, and the letter is not.

[69] Pursuant to s. 278.95(1)(d), I must decide if these reasons may be published. As I have determined that the texts are admissible and have not referred to details of the

love letter, I conclude that the complainants' rights to privacy would not be prejudiced and it would be in the interests of justice to permit that the reasons be published, broadcast or transmitted.

WENCKEBACH J.