

SUPREME COURT OF YUKON

Citation: *R v S*,
2024 YKSC 16

Date: 20240321
S.C. No. 22-01510
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

T. R. S.

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Publication of evidence, information, representations or reasons given at the show cause hearing is prohibited by court order pursuant to s. 517 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the Crown

Andreas Kuntz

Counsel and Agent for the Defence

Jennifer Budgell

This decision was delivered in the form of Oral Reasons on March 21, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): The accused, T.R.S., has been charged with multiple counts of sexual and physical violence against his former common-law partner, S.H.

The trial is scheduled to proceed in front of a judge and jury.

[2] When S.H. went to the police with her complaint against Mr. S., S.H. also told police that Mr. S. had told her about his interest in child pornography and showed her images of child pornography. Following this report, the police sought and obtained two search warrants. In the first, they were permitted to search Mr. S.' home. After their search, they seized various electronics. In the second search, they were permitted to search the electronics. As a result of the second search, the police were able to find child pornography on Mr. S.' iPad.

[3] The Crown has brought an application to adduce disreputable conduct evidence against Mr. S. Specifically, the Crown seeks to adduce evidence that Mr. S.' iPad contained images of child pornography on the date it was seized. The Crown seeks to elicit this evidence as part of its case in relation to an allegation of sexual assault and the allegation of uttering threats.

[4] The legal principles on disreputable conduct evidence are uncontroversial. Evidence of an accused's disreputable conduct is presumptively inadmissible because this form of evidence raises the risk that the trier of fact, particularly if the trier of fact is a jury, will use it improperly (*R v Handy*, 2002 SCC 56 ("*Handy*") at paras. 31-33).

[5] There are exceptions to the rule that disreputable conduct evidence is not admissible, however. It may be admitted if the Crown establishes that the evidence is relevant, material, and that its probative value outweighs its prejudicial effect (at para. 50).

[6] To assess the probative value of the evidence, the judge considers:

- the strength of disreputable conduct evidence;

- the connection between the accused and the evidence, as well as the extent to which the proposed evidence supports the inferences the Crown is seeking to make; and
- the extent to which the matters the evidence tends to prove are live issues in the proceedings.

(*R v ZWC*, 2021 ONCA 116 (“*ZWC*”) at para. 98)

[7] The court must then assess the moral prejudice and reasoning prejudice that is likely to arise if the evidence is admitted.

[8] Moral prejudice is the risk that the trier of fact will convict the accused on the basis that they are a bad person. Thus, in determining the moral prejudice, the court must assess the extent of the risk that the trier of fact will use the evidence to draw the inference that the accused is the kind of bad person who is likely to have committed the offence with which they are charged (*Handy* at para. 31).

[9] Reasoning prejudice occurs when the disreputable conduct evidence diverts the jury from its task. The judge may use a number of factors to determine the extent of reasoning prejudice, including:

- whether the trier of fact may be distracted from the real issue because of the inflammatory nature of the evidence;
- whether the trier of fact may become confused about which evidence pertains to the crime charged and which relates to the alleged discreditable conduct;
- whether there will be a disproportionate focus on whether the discreditable conduct occurred; and

- whether, because of the passage of time, surprise, or the collateral nature of the evidence, the accused will not be able to respond to the allegation.

(ZWC at para. 203)

[10] Finally, the prohibition on the admissibility of disreputable conduct evidence applies to evidence that is extrinsic to conduct on which the indictment is based. It does not apply to conduct in which the indictment is based, that is, original evidence (*R v JGB*, 2010 BCCA 2 at para. 24).

[11] The Crown is seeking to introduce the same evidence in support of two charges. I will conduct one analysis but will address how the test applies to the different charges as necessary. My conclusions will address the admissibility of the evidence as well as the purposes for which the evidence is admissible.

[12] The first question, then, is whether the proposed evidence is relevant.

[13] The facts related to the threats are that Mr. S. allegedly threatened to bring S.H. down and kill her if she ever told anyone about the child pornography. The Crown submits that evidence that the police found child pornography on Mr. S.' iPad is relevant to three issues: first is Mr. S.' motive in making the threat; second is credibility; and third is that there is a potential that the use of pornography vitiated S.H.'s consent.

[14] I conclude that the evidence is not relevant to the issue of vitiation of consent but is relevant to credibility and motive.

[15] The Crown argues that, based on the police report, S.H.'s evidence may be that when Mr. S. showed her child pornography, this vitiated her consent to what had been consensual sexual contact.

[16] Having reviewed the transcript of the police statements, in my opinion, the only logical interpretation of S.H.'s statements is that she alleges that sexual contact with Mr. S. was completely non-consensual. I do not see how her statement could lead to the conclusion that there was consensual sexual contact that became non-consensual when Mr. S. showed her the child pornography. I therefore will not consider the use of this evidence for the purposes of establishing vitiation of consent.

[17] On the other hand, the alleged threat is directly related to Mr. S.' alleged possession of child pornography. The charge of uttering threats comes from S.H.'s statement that Mr. S. told her that if she told anyone about the child pornography, he would harm her. The link to motive is clear. Moreover, it assists in establishing credibility. Evidence that Mr. S. had child pornography provides some support to the allegation that he threatened her because of it.

[18] The facts related to the sexual assault are that Mr. S. allegedly showed S.H. images of child pornography while sexually assaulting her. The Crown submits that, as with the threats, this evidence is relevant to S.H.'s credibility. Mr. S.' counsel argues that the Crown seems to be submitting that S.H. states that Mr. S. showed her child pornography during some sexual assaults, evidence of child pornography was found on Mr. S.'s iPad, S.H. is telling the truth about the child pornography, therefore she is also telling the truth about the sexual assault. Defence counsel argues that this is not the appropriate way to draw an inference.

[19] However, I see the evidence as being indicative of credibility in a much simpler way. It provides some corroborating evidence of an aspect of the complainant's allegations. S.H. said that Mr. S. showed her child pornography during a sexual contact

and he does possess child pornography. This may assist in establishing S.H.'s credibility on this aspect of her allegations, and then possibly more generally as well.

[20] I conclude that it is relevant to establishing motive with regard to the threats as well as credibility with regard to the threats and sexual assault.

[21] The next issue is how probative the evidence is. This involves examining the strength of the evidence, the connection between the accused and the evidence, and the extent to which the evidence proves a live issue at trial.

[22] The evidence does appear to be strong. An RCMP report states that the images attained through a search warrant include images of young children — at least some of them were, therefore, clearly under the age of majority. The evidence was also found in the accused's home on an iPad that belonged to the accused and was unlocked with a password the accused gave to the police.

[23] Defence counsel notes that the images were seized on March 15, 2022, while S.H. reported that Mr. S. showed her images between November 2020 and January 2022. She submits that before the evidence can be said to support the inference the Crown seeks to draw, the Crown will have to prove that Mr. S. possessed the images during the time-period alleged by the complainant.

[24] I do not agree. The Crown is seeking to introduce the evidence to support the conclusion that Mr. S. possessed child pornography at the time of the alleged offences. The Crown would simply be asking the jury to infer that, as Mr. S. had child pornography shortly after the last alleged occurrence occurred, then he also had child pornography at the time the alleged offences occurred. The Crown need not prove that

the images seized were the very same images Mr. S. possessed during the time of the alleged offences.

[25] Defence counsel also submitted that the evidence is not highly probative because it provides little support to the issue of credibility.

[26] I agree with defence counsel's submission as it relates to the charge of sexual assault. Although the jury could find that S.H.'s report that Mr. S. showed her pornography while sexually assaulting her is corroborated somewhat because he did actually have child pornography, the jury could come to other conclusions as well. For instance, as defence counsel noted, another possible inference is that S.H., who lived with Mr. S. for a significant amount of time, knew there was child pornography in Mr. S.' home and simply wove that element into her false allegations against him. There is no compelling link between the fact of Mr. S.' possession of child pornography and the conclusion that S.H. was shown child pornography while being sexually assaulted.

[27] I agree that this does attenuate the probative value of the evidence as it relates to credibility on the allegation of sexual assault. It does not, however, attenuate the probative value of evidence as it relates to the motive for uttering the threat. S.H.'s knowledge of Mr. S.' possession of child pornography would provide strong motive for a threat. Moreover, it could affect credibility on the issue of threat. Confirmation that Mr. S. possessed child pornography would be corroborative.

[28] Now I turn to the extent to which the evidence tends to prove live issues in the proceedings. Both motive and credibility are live and important issues on the charges. It is likely that the determination of the charges will depend almost entirely on the assessment of credibility.

[29] The probative value is therefore somewhat to very weak in relation to the question of credibility on the charge of sexual assault, primarily because it does not strongly support the inferences of credibility the Crown seeks to draw. The probative value in relation to questions of credibility and motive on the charge of uttering threats, however, is strong.

[30] Having assessed the probative value of the evidence, the next step is to determine the moral prejudice and reasoning prejudice. On its face, it would seem self-evident that admitting this evidence would be highly morally prejudicial. Possession of child pornography is not only illegal, but it is morally repugnant. A jury will very likely be affected by such evidence. The temptation to punish an accused for possessing child pornography rather than for the offences for which he was charged would be strong.

[31] The wrinkle here is that Mr. S.' possession of child pornography forms the factual basis for the charge of uttering threats. It also arguably forms part of the factual basis for the charge of sexual assault. However, for the purposes of this application on this question, I will address the evidence only as it pertains to the charge of uttering threats because it is clearly part of the offence itself.

[32] On the sexual assault charge, my inclination is that showing a complainant images of child pornography during an alleged sexual assault would also form part of the offence. However, this was not argued and I do not want to preclude argument on it, so I will not include it in my analysis here.

[33] The issue here is that, if evidence about Mr. S.' alleged possession of child pornography is introduced through S.H.'s evidence about the threat, then the moral outrage caused by introducing it — again, through the evidence the Crown seeks to

adduce — is reduced. It must be determined therefore if the evidence that Mr. S. possessed child pornography is admissible because it is part of the charge of uttering threats. If it is part of the charge of uttering threats, it is not evidence of disreputable conduct but is evidence that is included within the indictment.

[34] The reason it forms part of the charge of uttering threats is because, as noted above, S.H. alleges that Mr. S. threatened S.H. that if she ever told anyone about Mr. S.' possession of child pornography, he would implicate her in the use of child pornography and kill her. Evidence that Mr. S. is interested in and had child pornography is an integral part of the charge of uttering threats. It is not extrinsic conduct evidence; it is original evidence. The doctrine of discreditable conduct evidence does not apply, so the evidence is admissible.

[35] If S.H.'s testimony is consistent with her police report, then, she will testify to Mr. S.' possession of child pornography as part of her testimony about his threats against her. The moral prejudice the jury would experience would arise from that testimony. Evidence that the police found child pornography on an electronic device in Mr. S.' home would perhaps help cement the moral prejudice but nothing more. While there would be moral prejudice if this evidence is admitted in the way the Crown seeks, it would not be high.

[36] I will now consider the question of reasoning prejudice. I will do so by addressing the following factors: the extent to which the jury may be distracted from the real issue because of the inflammatory nature of the evidence; and whether too much trial time will be consumed by unduly focusing on whether the similar acts occurred.

[37] The other factors, that is, whether the evidence will confuse the jury and whether the accused is able to respond to the allegation, are not applicable here. The evidence is discrete and sufficiently different from the charges that the jury is unlikely to become confused. Additionally, Mr. S. is able to respond to the allegation.

[38] So, the first factor to address is whether the jury may be distracted from the real issue because of the inflammatory nature of the evidence.

[39] As noted above, the nature of the evidence is very inflammatory. However, as with the issue of moral prejudice, because it is anticipated that it will be introduced through S.H.'s testimony, the impact of reintroducing it is lessened.

[40] Turning to the time necessary to adduce the evidence, there is prejudice on this issue as well. Some time will be needed to adduce the evidence because police evidence will have to be called about the process used for uncovering the evidence and defence will have the opportunity to contest it. This will increase the length of the trial and adds to the reasoning prejudice.

[41] I will next balance the probative value with the prejudice.

[42] The probative value of the evidence on the allegations of uttering threats is high, while on the allegation of sexual assault is low. On the other hand, there is prejudice in repeating the evidence and in the time the evidence would take in the trial. Ultimately, however, given the importance of Mr. S.' alleged possession of child pornography to the charge of uttering threats, it seems to me that the evidence should be admissible despite the prejudice.

[43] I therefore conclude that the evidence is admissible. In addressing the purposes the evidence can be used for, I conclude that it can be used for the purposes of establishing motive and credibility on the charge of uttering threats.

[44] Whether the Crown should be able to use it for the purposes of credibility on the issue of sexual assault is a more interesting question. Had the application been about the charge of sexual assault alone, I would have denied it. The probative value is simply too low and the prejudice too high to admit it for use in that circumstance. If the evidence will be adduced for other purposes, however, then the jury may seek to draw inferences about what use they should make of the evidence on the charge of sexual assault as well — with or without submissions from the lawyers and guidance from the Court. It seems to me that the better approach is to allow for the parties to refer to the possible inferences that can be drawn, as well as the frailties of any possible inferences on the charge of sexual assault.

[45] I therefore conclude that the Crown is permitted to adduce evidence that the respondent's iPad tablet contained images of child pornography on the date it was seized in order to support the credibility of the complainant's anticipated testimony that Mr. S. threatened her about disclosing that he possessed child pornography and that he showed her child pornography during sexual assaults. It is also admissible to support motive for uttering threats.

WENCKEBACH J.