

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE**

MONTSERRAT

CLAIM NO. MNIHCR 2023/0010

BETWEEN:

[1] THE KING

Claimant

and

[1] BERTRAM CECIL LINDSEY

Defendant

Appearances:

Ms. Kadian McNeil for the Crown
Mr. Kenroy Hyman for the Defendant

2023: NOVEMBER 9
DECEMBER 13

RULING

FITZPATRICK [AG]:

THE COURT CONSIDERED THE FOLLOWING:

- [1] Bertram Cecil Lindsey (the “Applicant”) is accused of raping the complainant (“NG”) on each of April 21, 2023 and April 22, 2023. The Applicant denies having any sexual interaction with NG on the dates alleged or at any other time. A jury trial date of November 6, 2023 was set for these charges but this trial date was abandoned to address the below issues only recently arisen.

- [2] The Applicant brings an Application (the “Applicant’s Application”) identifying two distinct tranches of disclosure he seeks from the Crown (the “Respondent”).
- [3] The first tranche requested by the Applicant is all text, voice notes and Instagram messages from April 21, 2023 at 6:00 p.m. to April 22, 2023 at 11:30 a.m. stored on the Applicant’s cell phone seized and held by the Royal Montserrat Police Service (“RMPS”).
- [4] The second tranche sought by the Applicant is all information in the Crown’s possession pertaining to the allegations of rape made by NG against her uncles, Jermaine Meade and Lesroy Meade, including her ABE interviews and all witness statements in relation to those allegations along with her “subsequent recantation of those allegations”.
- [5] The allegations against Jermaine Meade and Lesroy Meade form the basis of charges presently before this Court in separate proceedings. The alleged recantation of these allegations by NG arise from emails dated August 30, 2023, August 31, 2023 and September 7, 2023 all purported to be authored by her (the “recantation emails”).
- [6] To be clear, neither the Applicant nor the allegations made against him by NG are referenced in the recantation emails.
- [7] Related to the above, the Applicant’s Application also seeks permission to cross-examine NG in the trial of this matter regarding the details of her allegations against her uncles along with her subsequent recantations.
- [8] The Respondent does not oppose that part of the Applicant’s Application seeking disclosure of the specified items from the Applicant’s seized cell phone. The Respondent advises that the RMPS extraction from the Applicant’s cell phone is ongoing but undertakes to provide the requested disclosure to the Applicant’s counsel once that extraction process is completed.
- [9] The Respondent takes the position that the subject emails are not recantations by NG, which is a fact for the jury in this matter to determine at trial. Regardless, the Respondent does not oppose that part of the Applicant’s Application seeking

disclosure of the alleged recantations by NG found in the recantation emails. These emails have been or now will be provided to the Applicant's counsel.

- [10] Further, the Respondent does not oppose the Applicant's counsel questioning NG in the trial of this matter about whether she made any allegations of rape against her uncles and whether she recanted those rape allegations if made.
- [11] In addition to the recantation emails, the Respondent has provided the Applicant's counsel with a copy of the draft Indictment(s) against NG's uncles (the "Meade Indictments") thereby providing Defence counsel with those charge specifics and related timeframes.
- [12] The Respondent opposes that part of the Applicant's Application seeking the disclosure and any related questioning of NG in the trial of this matter respecting the details of the allegations of sexual activity made by NG against her uncles, including the information found in her ABE interviews and all witness statements in relation to those allegations. The Respondent takes the position that the disclosure of all such information and related questioning is strictly prohibited as being evidence/questioning of NG about other, non-charge sexual activity.
- [13] The Respondent also brings an Application (the "Respondent's Application") seeking permission for NG to testify in this trial from a remote location. NG is presently residing in England. This is not surprising given the family strains referenced above. Related to this, the Respondent intends to play the ABE given by NG in this matter as her evidence in chief. The Respondent shared his preliminary plan to have NG attend at a court proximate to her current residence with the assistance of that local police service and, thereby, be available for cross-examination in this trial by the Applicant's counsel.
- [14] Lastly, the Respondent has served a Notice of Additional Evidence identifying their intention to adduce evidence from a clinical psychologist, Mr. Adegboyega Bamisile during the trial of this matter. Mr. Bamisile prepared an Analysis Report dated October 26, 2023 pertaining to NG and the recantation emails. The Notice of Additional Evidence filed includes a copy of Mr. Bamisile's Analysis Report. The Respondent confirmed that Mr. Bamisile will be called as a witness for the prosecution in this trial and, therefore, available for cross-examination by the Applicant's counsel.

- [15] The Applicant does not oppose the Respondent's Notice of Additional Evidence having now received confirmation that Mr. Bamisile will attend to give evidence.
- [16] To recap, the competing Applications were resolved by the respective concessions of both counsel at the beginning of this hearing excepting that part of the Applicant's Application seeking disclosure and related questioning of NG in the trial of this matter respecting the details of the allegations of sexual activity made by NG against her uncles, including her ABE interviews and all witness statements in relation to those allegations. However, this remaining part of the Applicant's Application was withdrawn during the latter part of this hearing following arguments advanced by both counsel to and exchanges with the Court. As a result, the Court was not called upon to render a decision in that regard.
- [17] Despite the Applicant having withdrawn his remaining request for relief, the Court considers the legal landscape engaged by this remnant of the Applicant's Application worthy of review and comment albeit now strictly in obiter.
- [18] The Applicant's position in his written material and in submissions before the Court was that the ABE and other information providing the details of the allegations of sexual activity made by NG against her uncles is required for the purpose of challenging NG's credibility in the trial of this matter. The Applicant did not identify any other basis for the information requested.
- [19] Simply stated, there is no doubt that credibility will be a relevant and significant issue in this trial. NG alleges rape. The Applicant denies any sexual interaction. Consent will not be an issue at trial.
- [20] The natural starting point to analyze the Applicant's position on his entitlement to the requested sexual activity information is the applicable statutory scheme. Section 293 of the Montserrat Penal Code ("MPC") addresses the issue of whether a complainant in a rape case may be asked questions in cross-examination about her non-charge, other sexual history.

- [21] MPC Section 293(1) prohibits adducing evidence or asking questions in cross-examination “about any sexual behaviour of the complainant”, which obviously references a complainant’s non-charge, other sexual activity. However, the Court may grant leave to adduce evidence of and cross-examine on a complainant’s non-charge sexual behaviour in certain circumstances specified in subsections 293(2), (3) and (5).
- [22] Subsection 293(2) permits the granting of leave where the Applicant satisfies the criteria in either subsection 293(3) or (5) and it is established that refusing leave would risk having a jury render an “unsafe conclusion” on any relevant trial issue.
- [23] Section 293(5) permits the Court to grant leave where the non-charge sexual activity evidence and cross-examination sought is “related to any evidence adduced by the prosecution about any sexual behaviour of the complainant”. The Respondent here is not intending to present any non-charge sexual activity of NG into evidence. As such, section 293(5) is not applicable.
- [24] Subsection 293(3) presents two distinct streams whereby leave may be granted.
- [25] Subsection 293(3)(b) permits leave where the evidence and cross-examination sought is relevant to the issue of consent subject to the additional requirement that the non-charge sexual activity in question must be sufficiently “similar” to the charge based sexual narrative to warrant admission. The requisite similarity is defined in subsection 293(3)(b)(i) and (ii). Given consent is not a trial issue, subsection 293(3)(b) is not engaged by the Applicant’s Application.
- [26] Subsection 293(3)(a), with one exception not applicable to this matter, permits leave where the evidence and cross-examination sought is relevant to a trial issue other than consent.
- [27] Here, NG alleges sexual assault on two occasions. The Applicant denies any sexual interaction. The evidence sought by the Applicant is related to the clearly relevant issue of credibility. As such, the Applicant satisfies the leave threshold provided at subsection 293(3)(a).

[28] However, the permission granted for leave at section 293(3)(a) is qualified by subsection 293(4). That latter section absolutely prohibits the Applicant from being granted access to information or being allowed to ask questions about NG's non-charge sexual activity for the purpose of challenging her credibility at trial. Again, the only basis submitted by the Applicant's Application for his request to have use of the non-charge sexual activity details is to challenge NG's trial credibility. As such, the absolute prohibition provided by subsection 293(4) would appear to be the end the analysis and the Applicant's request. This is the position championed by the Respondent.

[29] To address what appears to be an absolute statutory rejection of his request, the Applicant filed three cases with the Court, which I was grateful to receive. Each case addresses the interpretation of legislation in force in Wales with similar language to the absolute prohibition found in subsection 293(4). The seminal case relied upon by the Applicant is *R. v. T.*, [2001] EWCA Crim 1877.

[30] Based on the caselaw filed and paraphrasing, the Applicant argued that, regardless of purpose, if relevant then the information must be disclosed and cross-examination permitted to ensure a just verdict. Related to this, the Applicant submitted that once relevance is established then no leave of the court is required based on the reasoning in *R. v. T.* and following.

[31] The court in *R. v. T.* spent some time wrestling with whether questions focused on the falsity of non-charge allegations of rape constituted cross-examination about the "sexual behaviour" of a complainant. Ultimately, that court decided that questions directed to the falsity of such other rape allegations were not about the complainant's "sexual behaviour" but instead "statements in the past" thereby bypassing the type of absolute prohibition found at subsection 293(4). Despite this determination, that court, puzzlingly, commented that permission of the court would still be required to cross-examine on the subject of false allegations. I cannot agree with the interpretation and rationale presented in *R. v. T.* for the reasons that follow.

[32] The purpose of section 293 and similar regimes is to ensure trial fairness by prohibiting reference to a complainant's non-charge sexual history given the acknowledged concern that any such reference risks jurors engaging in the forbidden twin myth

reasoning, namely that someone who has engaged in other sexual activity is thereby more likely to have consented to the sexual act forming the basis of the charge before the Court or that such a person is less believable. Clearly, this risk is present where any reference is made to a complainant's sexual conduct outside of the narrative for the specific charge then before the jury.

- [33] Respectfully, it is an unproductive exercise to attempt an analytical parsing between questioning about non-charge sexual activity that goes to "credibility" versus questioning under a presumably benign heading like "false past complaint" with the pretense that this is somehow not foremost about a complainant's non-charge sexual activity. This was recognized in *R. v. T.* itself where that Court noted at paragraphs 27/28 that "where the disputed issue is a sexual one between two persons in private the difference between questions going to credit and questions going to the [crucial issue of whether there had been a sexual assault at all] is reduced to a vanishing point...It seems to us that the line is a difficult one to draw".
- [34] Challenging the falsity of a complainant's allegations of non-charge sexual activity is most certainly a challenge to the complainant's credibility about those sexual allegations. Regardless of the pathway for admission, the cross-examination by necessity involves referencing non-charge sexual allegations with the determination of the truth being left to the jury at the end of the evidence. Whether the cross-examination is premised on challenging the complainant's credibility or the falsity of other rape allegations, the jury will hear questions and answers about the complainant's non-charge sexual activity with the related risk of the jury falling into the prohibited twin myth reasoning consciously or unconsciously.
- [35] Without equivocation, the use of evidence of non-charge sexual activity can never be permitted to support one of the twin myths. However, in my view, there should be a limited exception for admission where such evidence can be presented in support of some other, relevant purpose, including credibility.
- [36] I suggest that MPC subsection 293(4) would benefit by transitioning from the existing absolute prohibition to a more nuanced process where the Court may consider leave to permit admission of information about non-charge sexual conduct upon relevance

being established even if going only to the issue of credibility, which will be the central if not only issue in most sexual assault cases.

[37] Once threshold relevance is established, the Court would then determine admission by undertaking a balancing of probative value to prejudicial effect of the requested information and questioning. This approach would allow for an analysis focused on the fundamental objective of ensuring a fair trial and just verdict rather than an exercise in wordsmithing around the legislated, absolute prohibition on credibility targeted cross-examinations of non-charge rape allegations.

[38] The touchstones of this proposed analysis are familiar. Evidence is relevant if it logically would make a fact in issue more or less likely. Probative value and prejudicial effect are case specific determinations but more generally terms that are well defined in our jurisprudence. Some factors the Court could consider in this proposed balancing are:

- a) The interests of justice, including the accused's right to make full answer and defence;
- b) Society's interest in encouraging the reporting and prosecution of sexual assaults;
- c) Whether there is a reasonable prospect that the proposed evidence will assist in the just determination of the charged sexual assault;
- d) The risk that the non-charge evidence may unduly lengthen the proceedings and otherwise distract the jury from its fact finding role in the determination of whether the charged sexual assault took place at all;
- e) The need to remove any discriminatory beliefs or bias from the fact-finding process;
- f) The risk that the proposed evidence may unduly arouse feelings of prejudice, sympathy or hostility in the jury; and,
- g) The potential prejudice to the complainant's personal dignity and privacy rights, especially where the complainant is vulnerable flowing from age or other circumstance.

- [39] If the requested evidence is relevant to a trial issue and its probative value strongly exceeds its prejudicial effect and is required to ensure a safe verdict then it should be admitted with related, focused cross-examination even if going only to the issue of credibility.
- [40] As noted above, my analysis of MPC subsection 293(4) is in obiter. I am not required to resolve the interpretation issues presented by section 293 to determine the balance of the Applicant's Application given the request for that remaining non-charge information has been withdrawn.
- [41] In summary, the Applicant presented three distinct claims for relief taken from the aggregate of his initial Application and his Response to the Respondent's Application. The Applicant asked to have information about the details of NG's non-charge allegations of sexual activity, in particular the ABE, witness statements and other information respecting the details of the allegations made by her against her uncles. He also asked to have information about and be able to cross-examine NG on any recantation of the allegations of rape made against her uncles. He further asked to have information about and cross-examine NG respecting inconsistencies found in statements she has made to third parties, in particular the RMPS and Dr. Bamisile, about her allegations against the Applicant.
- [42] Based on the Respondent's concessions referenced above, the Applicant will be at liberty to challenge NG's credibility during this trial by cross-examining her about the recantation emails, including focused questions as to whether NG alleged rape against her uncle(s) and whether any such allegations were subsequently recanted by her.
- [43] This permitted cross-examination will, broadly, touch upon NG's non-charge sexual activity, namely the limited details provided by the Meade Indictments, along with whether NG alleged any rape by her uncles and whether she retreated from those rape allegations, if made. Upon this foundation, the Applicant will have the opportunity to test and leave with the jury to determine the issue of whether NG fabricated other allegations of sexual assault. If the jury accepts that proposition as fact then this will of course be very relevant in support of the Applicant's intended defence of fabrication with respect to the charges he faces.

[44] Given the withdrawal of the request for the non-charge ABE and other information, the Applicant is prohibited from asking NG questions about the details of any non-charge sexual activity, including and in particular questions about the details of any sexual activity between NG and her uncle(s) save and only excepting the limited details provided by the Meade Indictments.

IT IS HEREBY ORDERED THAT:

1. The Crown shall provide to Defence counsel all texts, voice notes and Instagram messages from April 21, 2023 at 6:00 p.m. to April 22, 2023 at 11:30 a.m. stored on Bertram Cecil Lindsey's cell phone seized and currently held by the Royal Montserrat Police Service ("RMPS").
2. The Crown shall provide to Defence counsel complete copies of the emails dated August 30, 2023, August 31, 2023 and September 7, 2023 all purported to be authored by NG (the "recantation emails").
3. Defence counsel shall be permitted to question NG at the trial of this matter about the recantation emails, including whether NG alleged rape against her uncles, Jermaine Meade and/or Lesroy Meade and whether she subsequently recanted those rape allegations, if made.
4. Defence counsel shall be permitted to cross- examine NG respecting inconsistencies found in statements she has made to third parties about her allegations against the Applicant, in particular to the RMPS and Dr. Bamisile.
5. NG shall be permitted to attend this trial and testify remotely subject to acceptance by the Court of the proposed logistics for receiving her evidence remotely.
6. The Crown shall be permitted to present and adduce evidence from Mr. Adegboyega Bamisile, clinical psychologist, on the contents of his Analysis Report dated October 26, 2023 pertaining to NG and the recantation emails.

7. That part of Bertram Cecil Lindsey's Application seeking the disclosure and questioning of NG in the trial of this matter respecting the details of any non-charge sexual activity, including and in particular questions about the details of any allegations of sexual activity made by NG against her uncles, Jermaine Meade and/or Lesroy Meade, including her ABE interviews and all witness statements in relation to those allegations, is withdrawn and dismissed.
8. The Defence is prohibited from asking NG questions about the details of any non-charge sexual activity, including and in particular questions about the details of any sexual activity between NG and her uncles, Jermaine Meade and/or Lesroy Meade, save and only excepting the limited details provided by the Meade Indictments.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR (AG)