

DISTRICT COURT OF QUEENSLAND

CITATION: *R v HSN* [2020]

PARTIES: **THE QUEEN**
(Respondent)
v
HSN
(Applicant/Defendant)

FILE NO/S: Indictment No. 4861 of 2019.

DIVISION: Criminal

PROCEEDING: Application pursuant to Division 2A *Evidence Act 1977* (Qld)

ORIGINATING COURT: District Court, Rockhampton

DELIVERED ON: 13 November 2020

DELIVERED AT: Rockhampton

HEARING DATE: 21 October 2020 and 9 November 2020

JUDGE: Clarke DCJ

ORDER: **The provisions in Division 2A *Evidence Act 1977* (Qld) apply in this case.**

CATCHWORDS: CRIMINAL LAW – EVIDENCE – leave sought to issue subpoena – protected counselling communication – whether Div 2A applies where the defendant is not charged with a sexual offence

LEGISLATION: *Evidence Act 1977* (Qld) Division 2A, S 14A, s14B, s 153

CASES: *R v JML* [2019] QDCPR 23, applied
R v DO [2019] QDCPR 49, cited
R v Boweden [2001] QB 88 (CA), cited
Maunsell v Olins [1975] AC 373, cited
Shahid v Scottish Ministers [2015] UKSO 58, cited

COUNSEL: S. Moon for the applicant/defendant
E. Sargent for the respondent
G. J. Webber for the counselled person

SOLICITORS: Greg Welsh & Co for the applicant/defendant
Office of the Director for Public Prosecutions for the

respondent

Legal Aid Queensland for the counselled person

- [1] The defendant is charged with a series of offences of violence, including torture, alleged to be domestic violence offences.
- [2] The defendant's legal representatives have previously sought to issue subpoena, relating to counselling she has received. His Honour Judge Burnett AM has previously been asked to consider whether leave is required, pursuant to Division 2A of the *Evidence Act 1977* (Qld) ("the Act") to issue the subpoena.
- [3] An issue arose in the course of that application, and it falls for me to make a determination about whether the provisions in Division 2A of the Act only have application when the counts the subject of the indictment are, or contain sexual offences, or whether the Division applies to proceedings for any offences. Accordingly, the parties wish a determination to be made upon this narrow issue of interpretation, and without regard to the documentation that has been delivered to the Court pursuant to the subpoena, which I understand has already been considered by his Honour in Chambers.
- [4] For the reasons that follow, I am of the view the provisions relate to the privileged protection afforded to a "*counselled person*", and the protection applies irrespective of the offences charged.
- [5] The *Evidence Act 1977*(Qld) was substantially amended on 1 December 2017 by the insertion of Division 2A. Her Honour Judge Fantin clearly set out the legislative

scheme in *R v JML*¹ (which was applied by his Honour Judge Administrator Smith in *R v DO*²) as follows:

“[37] The Explanatory Notes to the Victims of Crime Assistance and Other Legislation Amendment Bill 2016 outline the policy objective for introducing a sexual assault counselling privilege:

- (a) A person’s private, psychological and physical boundaries are invaded during a sexual assault and the harm inflicted on an individual can have long-term impacts. Sexual assault counselling services play an integral role in assisting people to recover;*
- (b) Since the late 1990s, all other Australian jurisdictions have introduced some form of statutory evidential privilege to limit the disclosure and use of sexual assault counselling communications during legal proceedings. These statutory protections seek to recognise the public interest in encouraging people who have been sexually assaulted to seek therapy to assist in their recovery and may also encourage them to report the crime to police; and*
- (c) Recommendation 130 of the Domestic and Family Violence Task Force Report Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland released on 28 February 2015 was that the Queensland government introduce a sexual assault counselling privilege, based on the New South Wales legislative model, which provides an*

¹ *R v JML* [2019] QDCPR 23.

² *R v DO* [2019] QDCPR 49.

absolute privilege in preliminary proceedings and a qualified privilege in other proceedings. In accepting this recommendation, the Queensland government acknowledged the benefits of the NSW model as it seeks to ensure the appropriate balance in each case between the right to a fair trial and the public interest in preserving the confidentiality of counselling communications

[38] *The scheme seeks to balance the competing public interests of ensuring the fair trial of an accused with respecting the privacy of counselling communications.*

[39] *By virtue of section 14F, a person cannot without the leave of the court:*

- (a) *“compel, whether by subpoena or otherwise, another person to produce a protected counselling communication to a court;*
- (b) *produce to a court, adduce evidence of or otherwise use, a protected counselling communication;*
- (c) *otherwise disclose, inspect or copy a protected counselling communication.”*

[6] Although no authority was cited for the statement, her Honour also had stated the following at paragraph 33 of the judgment in *R v JML*³:

³ *R v JML* [2019] QDCPR 23.

- (a) *“Notably, the privilege is not limited to counselling arising from or relating to the alleged sexual assault offence. It applies to counselling communications the alleged victim of a sexual assault offence has had at any time with a counsellor.”*

[7] With respect, I agree with that statement, which seems to be clearly supported by a literal construction of the Act.

[8] Section 14A of the Act provides:

14A Meaning of protected counselling communication

- (1) *A protected counselling communication is an oral or written communication made in confidence—*
- (a) *by a counselled person to a counsellor; or*
 - (b) *by a counsellor to or about a counselled person to further the counselling process; or*
 - (c) *about a counselled person by a parent, carer or other support person who is present to facilitate communication between the counselled person and a counsellor or to otherwise further the counselling process.*
- (2) *However, a communication made to or by a health practitioner about a physical examination of the counselled person conducted in the course of an investigation into an alleged sexual assault offence is not a protected counselling communication.*
- (3) *For subsection (1) it does not matter whether the communication was made—*
- (a) *before or after the act or omission constituting the sexual assault offence committed or allegedly committed against the counselled person occurred; or*
 - (b) *in connection with the sexual assault offence, or a condition arising from the sexual assault offence, committed or allegedly committed against the counselled person.*
- (4) *A reference in this division to a protected counselling communication includes a reference to—*
- (a) *a document to the extent it contains a protected counselling communication; or*

(b) *evidence to the extent it discloses a protected counselling communication.*

(5) *In this section— health practitioner means a person registered under the Health Practitioner Regulation National Law to practise a health profession.*

[9] Further support for this interpretation of the provisions can be gleaned from the definition of “*counselled person*” in s14B, which envisages no limit on the charges for determination being related to the counselling.

[10] Section 14B of the Act provides:

"counselled person" means a person who—

(a) *is being, or has at any time been, counselled by a counsellor; and*

(b) *is or has at any time been, a victim or alleged victim of a sexual assault offence.*

[11] Sections 14C and 14D of the Act confirm the existence of an absolute privilege in bail and committal proceedings; the provisions in s14E and 14F provide for the qualified privilege in trials or sentences. Specifically, s14E applies to a proceeding “*for the trial or sentencing of a person for an offence*”. It does not only refer to a sexual offence; nor does the provision stipulate any discreet offences to which it only applies. In my view, the use of the term “*offence*” refers to any offence as defined in sections 1, 2 and 3 of *The Criminal Code*.

[12] The transitional provision in s153 *Evidence Act 1977* (Qld) also confirms Division 2A applies to a proceeding for an offence, or a domestic violence proceeding, whether or not the offence or grounds for proceeding happened before or after the amendment.

[13] I am satisfied there is no obvious or apparent ambiguity on a plain literal reading of the provisions. Applying the established rules of statutory interpretation, in my

view, the provisions clearly relate to the counselling, and not to a particular offence, or class of offences. Ordinarily, the starting point for determining the meaning of any word or phrase is that it bears its ordinary meaning in the context of the statute.⁴ Unless there is sufficient reason to give a secondary or limited meaning in a particular case, a word should be given its ordinary meaning.⁵ I am satisfied this provision does not necessitate the circumvention of the plain meaning of the legislation in order to avoid absurd or perverse consequences.⁶

[14] Further, it appears to me the provisions are consistent, and also achieve the purpose the amendment sought to achieve: to attach privileged protection to communications made by an alleged victim of sexual assault.

[15] I appreciate that ordinarily the legal representatives for a defendant may seek leave to issue subpoena to obtain documents of substantial probative value, which could (as Smith DCJA said in *R v DO*⁷) “*provide the defence fertile ground for cross examination*” about the sexual offences in that case. I accept the application of the legislation would ordinarily contemplate the counselling be linked to the alleged sexual offending. However, the defence may also consider, as apparently in this case, that notwithstanding the potential prejudice to the defendant caused by the jury becoming aware the complainant has also been the alleged victim of sexual abuse (especially where the defendant may also be alleged to be the perpetrator of that), there is some clear forensic advantage to be gained, if leave be granted to issue the subpoena.

⁴ *R v Boweden* [2001] QB 88 (CA).

⁵ *Maunsell v Olins* [1975] AC 373.

⁶ *Shahid v Scottish Ministers* [2015] UKSO 58.

⁷ *R v DO* [2019] QDCPR 49.

- [16] In the instant case, Counsel for the counselled person submits it does not matter what offence is for determination; the issue is whether the “*counselled person*” is entitled to the privilege of her counselling communication because she is, has been, or is alleged to be, the victim of a sexual assault offence, as defined by s14B of the Act. I am prepared to accept that submission.
- [17] Although the Crown adopt a neutral position in respect of the substantive application, similar submissions were made which support the argument of Counsel for the counselled person, which I also accept.
- [18] In the circumstances, in my view, the provisions in Division 2A of the *Evidence Act* 1977 (Qld) apply in this case. I am satisfied the privileged protection applies to any counselled person, as defined, irrespective of whether the charges for determination are of a sexual nature; and I am also satisfied there does not need to be any nexus between the counselling and the charges to be determined.