PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v V(C)*, 2020 NSPC 44

Date: 20201030
Docket: 8328691
Registry: Kentville

Between:

R

v.

V(C)

Restriction on Publication: 486.31(3)(j) and 278.95(1) CC
Identifying Information Removed
DECISION ON S. 276 APPLICATION

Judge:	The Honourable Judge Ronda van der Hoek, PCJ
Heard:	September 16, 2020 and October 23, 2020, in Kentville, Nova Scotia
Decision	October 30, 2020
Charge:	s. 266 *Criminal Code*
Counsel:	Daniel Rideout, for the Crown Thomas J. Singleton, for the Defendant Carbo Kwan, for the Complainant

- **486.31 (1)** In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.
- **Marginal note:Hearing may be held**

  (2) The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.
- **Marginal note:Factors to be considered**

  (3) In determining whether to make the order, the judge or justice shall consider

- **(a)** the right to a fair and public hearing;
- **(b)** the nature of the offence;
- **(c)** whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- **(d)** whether the order is needed to protect the security of anyone known to the witness;
- **(e)** whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
- **(e.1)** whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
- **(f)** society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
- **(g)** the importance of the witness' testimony to the case;
- **(h)** whether effective alternatives to the making of the proposed order are available in the circumstances;
- **(i)** the salutary and deleterious effects of the proposed order; and
- **(j)** any other factor that the judge or justice considers relevant.

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

- **(a)** the contents of an application made under subsection 278.93;
- **(b)** any evidence taken, the information given and the representations made at an application under section 278.93 or at a hearing under section 278.94;
- **(c)** the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and
- **(d)** the determination made and the reasons provided under subsection 278.94(4), unless
    - **(i)** that determination is that evidence is admissible, or
    - **(ii)** the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

By the Court:

Introduction:

[1] Charged with assault between April 1, 2018 and November 26, 2018, the applicant brings this s. 276 CC application seeking leave to cross-examine the complainant about other sexual activity that occurred between them over the course of their relationship. In particular, he would like to question her about specific sexual activity, the nature of the activities, and their discussions about how consent was communicated between them. The applicant also intends to address the same issues should he elect to testify in the trial.

[2] To provide context, the application was brought *after* the complainant completed her examination in chief and during her cross-examination. Questioning was halted, and the court heard argument that the s. 276 regime is engaged on these facts in the context of an assault trial. After reviewing *R. v. Floyd*, 2019 ONSC 7006, defence counsel conceded the necessity of this step and brought the application.

[3] Stage one was addressed on an earlier date and the court permitted the stage two *voir dire* to proceed.

[4] The proper materials have been filed, proper notice has been given, and the matter was heard in closed court. The complainant was represented by Ms. Kwan who filed written submissions.

[5] Before addressing the arguments raised, it is useful to first set out the legal parameters for such an application.

<u>The Legislation</u>:

> Evidence of complainant's sexual activity
>
> 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

Conditions for admissibility

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

(b) is relevant to an issue at trial; and

(c) is of specific instances of sexual activity; and

(d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

The Law:

[6] The Supreme Court of Canada in two recent decisions, *R. v. Goldfinch*, 2019 SCC 38 and *R. v. RV*, 2019 SCC 41, addressed the two-stage analysis on an application under section 276. Karakatsanis J. writing for the majority in both decisions explained the purpose and process of advancing such an application. As a starting point, cross-examination that is undertaken to advance a twin myth, "undermines the truth-seeking function" of a trial and "threatens the equality, privacy and security rights of complainants." (*Goldfinch* at para. 1) As such, twin myths-based evidence is never admissible.

[7] Subsections 276(2) and (3) do not create a gateway for the court to receive such evidence, but instead create a statutory exception to the presumptive inadmissibility of evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge." In short, if needed for an admissible purpose that does not offend the prohibition against the myths, such evidence may properly come before the court.

[8] The 276 application requires the court to balance "admitting evidence of a sexual relationship that may be fundamental to making full answer and defence" and "protecting complainants and the integrity of the trial process from prejudicial reasoning".(*Goldfinch* at para 2).

[9] Admissibility rests on the applicant meeting the test in s. 276. Section 276(3)(a)-(h) set out the factors a court shall use to assess admissibility.

[10] The suggestion that a repetitive "pattern of consenting" is relevant to consent appears to fall squarely within the prohibited reasoning that because a person consented before she is more likely to have consented again. In *R. v. Darrach*, 2000 SCC 46, Justice Gonthier stated that "evidence of prior sexual activity will rarely be relevant to […] establish consent." (para. 58)

[11] Justice Doherty in *R. v. LS*, 2017, ONCA 685, set out emphatically that it is important the court "have a clear understanding of the nature of the evidence the defence seeks to adduce" (para. 65). The case also acknowledges that the evidence of specific incidents must evolve to accord with the nature of the relationship as in this case where they were together frequently and the applicant seeks to question her about how she consented in the context of their relationship. As such there is no requirement to identify a specific sexual incident.

[12] Ultimately, "relevance is the key which unlocks the evidentiary bar", to the court allowing the evidence to be led on the trial. (*Goldfinch, supra*, at para. 5)

[13] Of course, a factual foundation for the application is needed to establish relevance. In some cases the court is provided a synopsis of the crown's case and the anticipated evidence, receiving same better affords the court opportunity to hear the application in a proper context. In that regard, the Court benefitted from hearing the direct testimony of the complainant. Since it was raised by defence counsel, I will say that the court does not assess witness reliability and credibility in a trial until after the court has heard *all* the evidence and carefully considered it in light of the oft cited applicable rules and processes. I have not made a premature determination of what testimony will inform my findings of fact, to do so at this stage would not accord with the presumption of innocence that applies to Mr. V. throughout the trial. Rather, I will consider the complainant's testimony, and indeed the contents of Mr. V's affidavit, as any court would while undertaking a stage two analysis. My approach finds support in the recent decision of the SCC in *Goldfinch, supra*.

The Factual Foundation for the Application:

[14] At all relevant times, the complainant and the accused were in an exclusive dating relationship during which they engaged in consensual sexual relations; there is no allegation the applicant sexually assaulted the complainant. The complainant testified that on three separate days while they engaged in consensual sexual activities, the accused repeatedly bit her upper body leaving marks. She testified that during the biting she repeatedly told him to stop. She reported using various words including "no", "stop" and their agreed upon safe word "pineapples". On each of those occasions the applicant did not stop biting her until she took more aggressive actions to make him stop.

[15] She testified that they were inspired to use the word pineapples as their safe word after watching actors do so in a television comedy.

[16] The assaults during sex were brought to the attention of police after the applicant pushed her into a wall on a different day when they were not having sex.

[17] The applicant provided an affidavit; he was not cross-examined on its contents. It sets out the foundation of his application as well as certain "facts" upon which the court was asked to rely.

[18] He believes the complainant was consenting to being bitten "based on her communications with me as to what she wanted of me during sexual activity". In particular, he says she told him "she enjoyed being bitten on her nipples and other

parts of her upper body during sexual intercourse." He says, as the relationship progressed, "we engaged in these activities more frequently". At various times, the complainant asked him "to bite her nipples and other parts of her upper body during sexual intercourse". He says she told him she enjoyed these activities.

[19] He agrees they adopted the word pineapples as a safe word after watching a comedy movie.

[20] The applicant says she told him on numerous occasions that she would use the word if she wanted him to stop. He says she never, not on one occasion, used the word for its intended purpose.

The Reason for Making the Application:

[21] The Applicant has positively identified two uses for the proposed evidence. He says it will (1) challenge the complainant's credibility and (2) support the defence of honest but mistaken belief in communicated consent.

[22] The Applicant argues the complainant's credibility is a principal trial issue and, citing *R. v. RSL*, 2006 NBCA 64 and *R. v. Crosby*, [1995] 2 SCR 912, submits credibility challenges are a permissible exception, per s. 267(2) CC. Finally, I am told I must assess her credibility based on her actions and their agreements, both at the time of and prior to the alleged incidents.

Honest but Mistaken Belief in Communicated Consent:

[23] The Applicant's Affidavit says he wants to lead evidence that the complainant was consenting to "all the activities in which they engaged", and because they had a safe word and she agreed to use it, he had every reason to believe she was consenting.

[24] The prior sexual activity evidence is needed to "directly link to factors" which led him to believe she was consenting to the biting. Pre-incident discussions they had will establish the parameters of the sexual activity in which they engaged. The Applicant says he will be deprived of his defence if he cannot ask questions. He points to *Goldfinch, supra,* at paragraph 62 "the defence must rely on *how* the complainant previously communicated consent so that the accused can adequately support a belief that consent was expressed".

[25] Defence also references para. 125 of *Goldfinch*, *supra*, asking the court to consider Moldaver J. comments, departing from the majority decision, when he suggests he may have ruled in favour of admitting the cross-examination questions if the defence had tied the questioning to a reason such as his hypothetical - that the jury needed to understand why this platonic friend said he "was going f* her". However, that was not the reason supporting the application in *Goldfinch* and the applicant appears to argue his case rises to the level of specificity missing in *Goldfinch*.

[26] In *R. v. Harris*, [1997] OJ No. 3560 (Ont. CA), a case overturning the trial judge's decision not to permit questions about a night previous when the two relative strangers had a sexual interaction, the Court concluded the trial judge's ruling, that its prejudicial effect substantially outweighed any probative value it might have in relation to the issue of honest but mistaken belief in consent, did not consider the issue of relevance. This was because there was no foundation for the defence based on the theory of the case. After reviewing section 276(2) governing admissibility rules, the Court of Appeal concluded at paragraph 34:

> [W]here evidence of prior consensual sexual activity between the parties is being proffered to support the defence of honest but mistaken belief in consent, it must be tested on a case-by-case basis having regard to all of the circumstances, including, but not limited to:
>
> - the viability of the defence itself;
> - the nature and extent of the prior sexual activity as compared to the sexual activity forming the subject matter of the charge;
> - the time frame separating the incidents; and
> - the nature of the relationship between the parties.

Crown's Position:

[27] The Crown says the Applicant has not met the test on the application. He fails on the grounds in s. 276- not admissible as it is sought to support twin myths reasoning. There is evidence of the safe word in the context of their relationship and the issues the applicant seeks to address in cross-examination, and in his client's anticipated testimony, are irrelevant and therefore inadmissible both to the suggested defence and to credibility. He says denying the application will only serve to deprive the applicant of asking questions aimed at embarrassing the

complainant by seeking details of other sexual activity, not making full answer and defence. Hopefully there is no intention to do this as the very regime rests on ensuring that we do not go back to the pre-*Seaboyer* days when sexual assault trials devolved into an effort to humiliate complainants and reduce the likelihood they would testify. He also says there is no substance to the argument about credibility, the only issue is whether the Court ultimately accepts her testimony. Credibility must relate to the specific incident and relevance to the trial. How these two previously communicated consent is already in evidence, and there is no basis to explore how they did so on other days. (see: *WD*, *Barton* and *Goldfinch*)

[28] Finally, the defence request to ask her questions about consent on other occasions when they had sex is not a relevant issue. They had a word, she used it. He did not heed her on three occasions, those occasions form part of the charged offence.

The Position of the Complainant:

[29] Ms. Kwan says the defence suggestion that he will advance the stated defence is a red herring. *Goldfinch* clearly explains the basis of the defence and there is nothing in the Applicant's affidavit to support it. There is simply an assertion the complainant told him she liked being bitten and he did it in the past, and he includes in his affidavit a strong suggestion she would ask him to do it. That is not the foundation for these charges, she did not testify that she asked him to do it, instead he just went ahead without consent. The law is clear a person must give clear unambiguous consent to touching, that was not what the Applicant suggests occurred here.

[30] Likewise, there is no suggestion as to what any of this intended questioning could do to assist in challenging her credibility, the court will either accept she said no, as understood by these two, or not. He can testify she did not say no, but more importantly must address whether she said yes.

[31] Ms. Kwan says she cannot imagine a clearer case of seeking leave to engage in twin myth focused cross-examination. If his application is granted it would have to be due to an error in concluding because she said yes on another occasion, she must mean yes, this time. That is an error of law.

Decision:

[32] In my view, after carefully considering the submissions of counsel and reviewing the briefs, the case law argued, and consulting my notes from the hearing, I conclude this application cannot be granted. I find no support for permitting questioning related to other sexual activity.

[33] I fail to see any reason why the defence cannot rely on the evidence already led in the case in chief to challenge the complainant's credibility. This is particularly so in light of the evidence of a safe word that is before the court. She has acknowledged a shared understanding of what the safe word meant to her and the applicant. She has testified that she used it and he did not heed it. Her evidence of communicating lack of consent is likewise before the court.

[34] Challenging her testimony does not require asking her about what may have occurred during other sexual activity between the two. In any event, there is no foundation in the application to suggest that there was an agreement between them of any different way to communicate no. The complainant has the right to end any act committed on her body whenever she says no. Even sex must stop if the complainant says no. The suggestion that there could be an exception and one gives up her future right to object to being bitten such that she is left with marks on her body, is ridiculous and contrary to the reasoning in *Barton*. Even in the context of what some might call "rough sex", no means no.

[35] I fail to see how the questions sought to be asked, "how the word pineapples came up", *inter alia*, is debatable. On other points, the Applicant agreed he did not seek to ask questions about sexual activity the two engaged in *prior* to coming up with the word, but only after that point. Such narrowing does not bolster support for the application.

[36] Equally so, questions about specific incidents of slapping establish no relevance to the case. It is neither relevant nor permissible to suggest she agreed to slapping *ergo* she should not be believed when she says no to biting. This type of questioning is clearly twin myth related and not admissible. The level of detail the applicant seeks to explore about what the two chose to do in bed, simply cannot be supported.

[37] With respect to credibility, I note *Crosby, supra*, involved a complainant who said she had never had sexual contact with the accused and was shocked when he said words about sex to her. The court found some context was needed or there was a risk of a misunderstanding for the jury. This application does not begin to compare and lacks the necessary context.

[38] The suggestion that evidence of the complainant letting the applicant bite her in the past would be used for anything other than twin myths reasoning, that she is more likely to have consented or that she is less worthy of belief, must surely be the only focus of this enquiry. It is inadmissible. Her testimony is that she said "no", and the court will assess her evidence at the end of the trial. No matter how she gave consent, she was always free to rescind it. His affidavit suggests she gave consent verbally at times; her evidence was that he bit her without consent, and she told him to stop. I also cannot ignore that the allegation of assault is not the first bite on each of the three occasions subject to the charge, but instead relates to the bites that occurred after she said no.

[39] I find there is no air of reality to the intended defence based on the affidavit or the theory of the crown's case as set out in the trial testimony.

[40] Since I have found that the foundation of the application is being adduced for the purpose of supporting twin myths reasoning and the evidence is not relevant to an issue at trial, it is unnecessary for me to go on to assess ss. 276(2)(d). However, I will say that the proposed evidence does not have significant probative value that is substantially outweighed by the danger of prejudice to the proper administration of justice because it is not relevant and prohibited. Having failed to establish the required criteria, the application is dismissed.

[41] On a final note, the Applicant's ability to make full answer and defence is not negatively impacted by this decision because he could gain nothing more than he has already available to him to challenge credibility and advance any relevant, plausible defence.

[42] Should I have granted this application it would have undermined society's interest in encouraging the reporting of assault in the context of sexual activity for fear that deeply personal and private details would be placed in the public realm during trial.

[43] On balance, I am not satisfied the Applicant has met the test, in the result, the application is dismissed.

Judgment accordingly.

van der Hoek J.