PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. M.B.H*, 2024 NSPC 37

Date: 20240221
Docket: 8609899
Registry: Sydney

Between:

His Majesty the King

v.

M. B. H.

Restriction on Publication: Sections 486.4 & s. 278.95(1)
Any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON THE APPLICABILITIY OF S. 276(1) OF THE CRIMINAL CODE AND THE SEABOYER PRINCIPLES TO CROWN LED EVIDENCE OF SEXUAL INACTIVITY/VIRGINITY

Judge: The Honourable Associate Chief Judge D. Shane Russell

Heard: February 21, 2024, in Sydney, Nova Scotia

Decision: February 21, 2024

Charge: Section 271 of the *Criminal Code of Canada*

Counsel: Darcy MacPherson, for the Crown
Christopher T. Conohan, for the Defence

By the Court:

Issue

[1] The Crown seeks to lead evidence at trial with respect to the complainant's sexual inactivity/virginity. The Crown argues that evidence of sexual inactivity/virginity does not engage the *Seaboyer* framework and s.276(1). Does the Crown's intention to lead evidence of sexual inactivity/virginity necessitate a formal *Seaboyer* application and admissibility *voir dire*?

Background

[2] A pre-trial conference was held. Counsel were asked to identify potential evidence which might engage s.276, s.278, and the *Seaboyer* framework. The Court was advised there were no such issues. Counsel were directed to bring the matter back for another pre-trial should anything arise. No requests were made and the Court assumed trial readiness.

[3] For reasons I will outline, it became apparent at the outset of trial that experienced counsel steered their respective cases directly into the lane of s.276, s.278, and *Seaboyer*. The Court paused proceedings partway through the direct examination of the Crown's second witness.

[4] The first witness was a medical doctor. She examined the complainant four days after the alleged incident. During cross-examination, Defence asked her if the complainant had told her she was a virgin. The Crown objected and strenuously argued that such a line of questioning ought to be the subject of a s.276(2) *voir dire*. The Court ruled that should Defence wish to pursue areas relating to the complainant's prior sexual activity, a proper s.276(2) application would have to be made. Counsel agreed.

[5] The Crown moved to its second witness, the complainant's friend. She testified that she was present at the social gathering on the night of the alleged incident. The Crown asked about her interactions with the accused on this date. She testified that the accused had been "inappropriate" and stated numerous times that evening that he wanted to have sex with the complainant in the shower.

[6] The complainant's friend added that she told the accused: "I don't think A.B's first time should be in the shower and that I think that it's a really bad idea". The Crown wished to continue this line of questioning which prompted a Defence objection and the Court's inquiry into relevance.

[7] Unless issues are flagged by counsel in advance trial judges navigate live testimony in the dark. As well, judges are repeatedly reminded of their role as

evidentiary gatekeepers. The complainant's prior sexual experience – or lack of sexual activity or virginity - is not on trial. In light of this the Crown was asked to articulate the relevance of such questioning before proceeding further. Specifically, what relevance does the complainant's sexual inactivity/virginity have to an issue at trial.

[8] The Crown in responding to the Court's inquiry stated they intended to call further evidence exploring the complainant's lack of sexual history/virginity beyond this particular witness. Broadly, the Crown submitted that such evidence will go to the issue of consent and to the context of explaining and understanding how the events unfolded. No further specifics were outlined at that time.

[9] As noted, the Crown takes the position that the *Seaboyer* framework is not engaged as evidence of sexual inactivity and virginity are the very opposite of sexual activity.

[10] As a result, the trial had been adjourned. Both counsel were instructed to refine their positions and arguments on the issue whether Crown-led evidence of sexual inactivity/virginity is captured under s.276(1) and engages the *Seaboyer* process.

The Position of Counsel

[11] The Crown's oral argument is supplemented by a written brief. To frame the argument, I will highlight certain selections. I wish to note that I have considered all arguments and cases cited by counsel even if not specifically referenced. Highlights from the Crown brief include:

1. The Crown submits that the evidence will establish that:
    a. The complainant expected to lose her virginity to the accused on the date of the incident;
    b. The complainant let the accused know, in advance, that she wanted her first time to be in the missionary position;
    c. The accused let the complainant know, in advance, that he preferred doggie style in the shower;
    d. The complainant specifically advised the accused that she did not want to have sex doggie style in the shower.

    The Crown respectfully submits that to ignore that the complainant was a virgin is to ignore a substantial part of the context of events.
2. The Crown does not seek to use the evidence to establish either of the twin myths. The relevance of the complainant's virginity goes to her motivation for consenting to one form of vaginal intercourse as opposed to another. There are no specific forms of sexual activity related to evidence of virginity. A

complete understanding of why the complainant was prepared to consent to one form of intercourse versus another can best be reached via an understanding of her motivation to consent or not to consent.

3. Neither the Crown nor the defence have indicated any intention to rely on evidence that the complainant was a virgin (prior to the events which form the basis of the s. 271 charge) to establish that she was more likely to have consented to the sexual activity that forms the subject-matter of the charge, nor that she was less worthy of belief. In fact, the Crown questions how such evidence could in any way be relied upon to establish either of the twin myths. This is the case and would still be the case even if evidence of virginity could somehow be captured by s. 276.
4. Neither of the twin myths can apply to virgins. Section 276 and the twin myths require consideration of prior sexual activity, while evidence of virginity is evidence of sexual inactivity.
5. The Crown cites *R. v. M.T.*, [2012] O.J. No. 3418 para. 32. "Where the purpose underlying the introduction of the evidence of extrinsic sexual activity is neither of those prohibited by s. 276(1), this exclusionary rule is not engaged.".

[12] The Defence had very little to add by way of submission other than to state they agree with the Crown's position as set out in the brief. However, Defence did add that depending on the outcome of this hearing they plan to bring a separate defence application under s.276(2) of the Code. The particulars of which have yet to be specified. In addition, Defence is in possession of a snap chat video which they are holding back for "impeachment" purposes. There will be a separate Defence application to determine whether that evidence is a "record" triggering s.278.92, s.278.93(1), and s.278.94.

Overview of the Law

[13] As stated by the Supreme Court of Canada, "sexual assault trials raise unique challenges in protecting the integrity of the trial and balancing the societal interests of both the accused and the complainant. Parliament and the courts have responded to these challenges by setting out rules of evidence tailored to this context" (*R. v. R.V.*, 2019 SCC 41, at para.1).

[14] The reality for trial judges is that the law in this area is rapidly evolving. Trial judges carry a heavy burden within this challenging landscape. They serve as "the ultimate evidentiary gatekeepers" (*R. v. R.K.K.* , [2022] B.C.J. No. 89, at paras. 4, 5, & 7). Trial judges "have a duty to vigilantly assess and exclude inadmissible

evidence regardless of the positions taken (or not taken) by counsel"(*R. v. Goldfinch*, 2019 SCC 38, at para. 75).

[15] Before evidence of a complainant's sexual history can be introduced it must be carefully scrutinized. Careful scrutiny ensures trial integrity. The British Columbia Court of Appeal recently stated in *R. v. R.K.K., supra,* at para. 6 :

> A situation where evidence is led by agreement or without objection, even by the Crown, does not absolve the trial judge of their gatekeeping role: *Barton* at paras. 68, 80; *R. v. R.V., 2019 SCC 41* at para. 78; *R. v. Langan, 2019 BCCA 467* at para. 66; *R. v. A.L., 2020 BCCA 18* at para. 150.

Application of the exclusionary rule in subsection 276(1)

[16] Section 276(1) of the *Criminal Code* reads as follows:

> 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.

[17] The provision applies with equal force regardless of whether it is the Defence or the Crown who seeks to adduce the evidence. The Supreme Court of Canada in *R. v. Barton*, [2019] S.C.J. No.33, at para. 80 stated:

> **80 …** s. 276(1)…is categorical in nature and applies irrespective of which party has led the prior sexual activity evidence. Thus, regardless of the evidence adduced by the Crown, Mr. Barton's evidence was inadmissible to support either of the "twin myths". Moving to s. 276(2), while it is true that this provision applies only in respect of "evidence ... adduced by or on behalf of the accused", the common law principles articulated in *Seaboyer* speak to the general admissibility of prior sexual activity evidence. Given that the reasoning dangers inherent in prior sexual activity evidence are potentially present regardless of which party adduces the evidence, trial judges should follow this Court's guidance in *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire* (see pp. 633-36).

[18] The Supreme Court of Canada again reinforced this reality in *R. v. R.V., supra,* at para 78:

> **78**. While s. 276(2) applies only to evidence "adduced by or on behalf of the accused", s. 276(1) and the common law principles apply to Crown-led evidence of a complainant's sexual history: *Barton*, at para. 80. In *Seaboyer*, McLachlin J. emphasized the importance of the trial judge's gatekeeper role in ensuring that sexual history evidence "possesses probative value on an issue in the trial ... [that] is not substantially outweighed by the danger of unfair prejudice flowing from the evidence": p. 635. Irrespective of which party adduces evidence of the complainant's sexual history, the trial judge must guard against twin-myth reasoning as well as prejudice to the complainant, the trial process and the administration of justice.

Purpose and Rational for *Seaboyer* and s. 276(1)

[19] The fundamental purpose behind the *Seaboyer* principles and s. 276(1) is to protect trial integrity. The processes created under both provisions allows a court to filter irrelevant and misleading evidence. Ultimately, these provisions serve to protect the accused's right to a fair trial and to encourage the reporting of sexual offences through the protection of the security and privacy of complainants (*R. v. Barton*, *supra*, at para. 74, *R. v. Goldfinch*, *supra*, at paras. 28-38, *R. v. R.V.*, *supra*, at paras. 32-46, and *R. v. J.J.*, 2022 SCC 28).

Is Crown-led evidence of sexual inactivity/virginity captured under *Seaboyer* and s. 276(1) ?

[20] The Supreme Court of Canada in *R. v. Barton*, *supra*, at para. 68 articulated a very important principle which serves to underpin the analysis:

> **68**…The ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge, not with the Crown. After all, it is the trial judge, not the Crown, who is the gatekeeper in a criminal trial. Moreover, I simply cannot accept that a complainant's dignity, equality, and privacy rights, which the s. 276 regime is meant to protect, may be waived by mere Crown inadvertence. There is nothing in the record suggesting that the Crown made a deliberate attempt to avoid the application of the s. 276 regime, and indeed it had no reason to. It certainly gained no tactical advantage as a result of non-compliance -- quite the opposite. And in any event, given the important objectives underlying s. 276, the Crown should refrain from commenting on a complainant's prior sexual history unless necessary. [emphasis added]

[21] In the same year, 2019, Karakatsanis J. writing for the majority of the Supreme Court of Canada in *R. v. R.V. supra*, at para. 81 stated:

> **81**.Whether sexual *inactivity* is captured by either s. 276 or the *Seaboyer* principles is not directly at issue before this Court. There is appellate authority stating that s. 276 does not prevent the complainant from testifying as to virginity: *R. v. Pittiman* (2005), 198 C.C.C (3d) 308 (Ont. C.A.), aff'd 2006 SCC 9, [2006] 1 S.C.R. 381, on a different point, at para. 33; *R. v. Brothers* (1995), 169 A.R.

> 122 (C.A.), at paras. 26-29. However, these cases also recognize that admitting evidence of virginity raises further questions, including: (i) the inferences the finder of fact may be asked to draw from the fact of the complainant's virginity and (ii) how the accused may challenge this claim: see *Pittiman*, at paras. 34-37; *Brothers*, at paras. 30-35. While I leave this issue for another day, I agree with Paciocco J.A. that it would be incongruous to hold that the statement "I am a virgin" does not engage s. 276 while an answer to the contrary would clearly be a reference to sexual activity: para. 79 [emphasis added]

[22] After reviewing both Supreme Court of Canada decisions it is clear to me that evidence with respect to a complainant's sexual inactivity/virginity engages s. 276(1) and *Seaboyer*. In reaching this conclusion, I am mindful that the comments in *R. v. R.V. supra*, appear to be obiter dicta. Nevertheless, these comments were made by the Supreme Court of Canada and provide informative, reflective, and persuasive guidance to this court. I note as well that the Supreme Court of Canada formulated this position after careful review and consideration of the Court of Appeal decisions of *R. v. Brothers*, *supra*, and *R. v. Pittiman*, *supra*. Engaging the *Seaboyer* framework allows this court to explore the two very issues identified by the Supreme Court of Canada in *R. v. R.V.*, *supra*.

***R. v. Diakite*, 2023 MBCA 42**

[23] In advance of this hearing the court provided counsel with a recent decision from the Manitoba Court of Appeal *R. v. Diakite*, *supra*. The core issues on appeal were framed as follows:

> 1…. This appeal is about whether the principles in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577, and section 276 of the *Criminal Code*, which govern the admissibility of evidence of a complainant's prior sexual activity, apply to evidence that a complainant was sexually inactive.
>
> 3… (i) Did the trial judge err by admitting Crown evidence that the complainant was a virgin (i.e., evidence of her prior sexual inactivity) at the time of the incident without first holding a *voir dire* to determine its admissibility?

[24] In *R. v. Diakite*, *supra*, the complainant testified that she met the accused at a club. Three to four months later she invited him to a social gathering at her apartment. While alone in her bedroom they engaged in consensual kissing and touching over the clothing. She told the accused that she did not want to have sex because she was a virgin. When the accused attempted to touch her under her clothing, she told him to stop, but he ignored her. The accused then forced himself on her, inserting both his fingers and penis into her vagina. Her dress was torn and she suffered vaginal pain and bleeding.

[25] One of the complainant's friends testified that she went to the room to check on the complainant. The friend testified that she did so because she believed the complainant was a virgin and that she was scared to have sex.

[26] A second friend of the complainant testified that she observed the complainant crying, that the complainant showed her a bloodstained sheet, and that the complainant told her that she had not consented.

[27] The accused testified. He stated that they kissed, he touched her breasts, and they tried to have sex. He described what were noted as "unsuccessful attempts". He stated that the complainant told him that she was a virgin. He was "stunned" as his religion did not permit him to have sex with a virgin. He got up and left the apartment. He denied having torn the dress and testified that he did not see any blood on the bed.

[28] The only issue at trial was consent. The trial judge convicted the accused.

[29] As outlined earlier, the Supreme Court of Canada in *R. v. R.V.*, *supra*, appeared to overturn the Appeal Court decisions of *R. v. Brothers*, *supra*, and *R. v. Pittman*, *supra*. As a result, a straightforward reading of *R. v. R.V.*, *supra*, suggests that the admissibility of evidence of sexual inactivity and virginity ought to be treated the same as evidence of prior sexual activity. However, the Manitoba Court

of Appeal in *R. v. Diakite*, *supra*, took a very narrow reading of the Supreme Court of Canada's decision. In doing so they declined to address the issue head on. The ultimate question was left for another day. The Manitoba Court of Appeal stated:

> **16** *RV* has to be read carefully because the Crown evidence in that case was different from that in the current case. In *RV*, the Crown not only led evidence that the complainant was a virgin but went on to lead evidence as to when that changed -- i.e., when she first had sexual intercourse. That is why Karakatsanis J stated that "[w]hether sexual *inactivity* is captured by either s. 276 [of the *Criminal Code*] or the *Seaboyer* principles is not directly at issue before this Court" (at para 81) and that "questions regarding when the complainant ceased to be a virgin undoubtedly fell within the ambit of s. 276 and the *Seaboyer* principles" (at para 82).
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> …
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> **18** As was the case in both *RV* and *R v Czechowski*, 2020 BCCA 277, it is not necessary to resolve that issue in this case. The Crown in this case stated, at the appeal hearing, that the complainant's evidence about her virginity was clearly set out in her statement to the police and disclosed to the Defence prior to the trial. The accused did not object to the admissibility of this evidence at the trial and, unlike in *RV*, he did not challenge its accuracy. In fact, he used that evidence to explain his own conduct in precipitously leaving the bedroom and the apartment following the incident.

> **19** Further, the evidence of the complainant's virginity was admissible for several purposes unrelated to the prohibited inferences in *Seaboyer* and section 276(1): to provide the complainant's explanation for not wanting to have sex with the accused (see *R v Kontzamanis*, 2011 BCCA 184 at paras 27-31; and *R v Garciacruz*, 2015 ONCA 27 at para 69); and to explain the bloodstains on the bed, on the pillow and on her dress, and her pain and difficulty urinating following the incident (see *R v S (S)*, 2006 CarswellOnt 4216 (Sup Ct J)).
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> …
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> **21** The best evidence of the complainant's subjective state of mind will often be the explanation in her own testimony -- in this case, her testimony of virginity. Evidence that is admissible for that purpose does not raise either of the twin myths. (See also *R v Olotu*, 2016 SKCA 84 at para 59, regarding the admissibility of a complainant's evidence about subjective consent.)
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> **22** Further, the Crown did not argue that the trial judge could infer that the complainant was less likely to have consented to have sex because she was a virgin.

[30] Unlike an Appeal Court, this court does not look at things through the rearview mirror. My job as the sitting trial judge is front-loaded. Trial judges interface with the s.276(1) and *Seaboyer* principles in real-time and prior to the train leaving the station. To be candid, paragraph 23 from *R. v. Diakite*, *supra*, gives me cold comfort:

> **23**… even if the trial judge erred in failing to hold a *voir dire* before admitting the Crown's evidence of virginity, the evidence was admissible for several reasons apart from consent, and it was not tendered for a purpose that engaged the twin myths in *Seaboyer* and section 276(1). Therefore, even if there had been a *voir dire*, the evidence would, in all probability, have been admitted. [emphasis added]

[31] It is clear to me that when the Manitoba Court of Appeal used language such as "if the trial judge erred in failing to hold a *voir dire*", "even if", and "in all probability", they were not committing to the proposition that virginity and sexual inactivity escapes the s.276(1) and *Seaboyer* process. In fact, absent from the decision is any endorsement that a trial judge ought to bypass this process.

[32] The reality remains that the Manitoba Court of Appeal evoked the curative proviso under section 686(1)(b)(iii) of the *Criminal Code* when examining the issue under appeal. Obviously, it would be wrong for this court to take procedural short cuts and hope that an appeal court would later evoke section s.686(1)(b)(ii), if necessary. In other words, it would be improper for this court to let the evidence unfold without first properly subjecting it to the checks and balances which come with conducting a *Seaboyer voir dire*.

[33] I find that *R. v. Diakite, supra,* does not stand for the proposition that sexual inactivity and virginity is automatically exempt from the provisions designed to

protect the integrity of the trial process and balance the respective societal interests of both the accused and the complainant. As well, it does not stand for the authority that when faced with the possible admission of such evidence, a trial court ought to dispense with holding a *voir dire*.

The overlap

[34] Independent of the Crown-led evidence on sexual inactivity/virginity, the accused may also be pursuing an application under s.276(2). Given this, it is important for the court to be mindful of how the accused's application may interface with the Crown-led evidence. In this regard I take direction from the Supreme Court of Canada in *R. R.V.*, *supra*, at para. 79:

> **79**. Where, as in this case, the accused's s. 276 application relates to Crown-led evidence, it would be prudent to consider both the Crown's proposed use of the evidence and any challenges proposed by the accused at the same time. A view of how both sides intend to use the evidence would allow trial judges to more accurately assess the impact of admitting such evidence and appropriately tailor the ways in which it may be adduced. Further, the Crown's decision to adduce evidence, or even to call a particular witness, is a matter of prosecutorial discretion: *Darrach*, at para. 69. If the manner in which the evidence may be challenged is clear from

> the outset, the Crown can make an informed decision about whether the interests of justice are served by adducing the evidence in the first place.

Conclusion

[35] I must look at the purpose for which the Crown-led evidence is being introduced. The best way of examining this will be through the lens which is a *Seaboyer voir dire*. This will ensure that relevant evidence is admitted, and irrelevant and prejudicial evidence excluded.

[36] The Crown will be given full opportunity to advocate for the admission of evidence they feel is essential to their case. However, this will be within the proactive protective confines of a *Seaboyer* application. Prior to the Crown being permitted to lead evidence with respect to the complainant's sexual inactivity/virginity, the Crown must comply with the framework as outlined in *Seaboyer*.

[37] The Crown will be required to serve and file an application to admit this evidence. As part of this application, the Crown will be required to outline specifics of the proposed evidence and to explain its relevance. To some degree the Crown in their brief has already articulated the same. The Court will hear any s.276(2) Defence application on the same date as the Crown's application.

[38] The specific and detailed framing of the Crown's application will also allow the accused an opportunity to formulate, refine, and add any challenges they may wish to make as part of their separate stand-alone s.276(2) application. This is consistent with the Supreme Court of Canada's guidance in *R. R.V.*, *supra*, at para. 79 and the approach taken in *R. v. G.E.*, 2020 ONCJ 448.

D. Shane Russell, ACJPC