SUPREME COURT OF NOVA SCOTIA
Citation: *R. R. v. R*, 2020 NSSC 407

Date: 20201130
Docket: Syd. No. 494235
Registry: Sydney

Between:

R. R.

Applicant

v.

Her Majesty the Queen

Publication Ban: S. 486.4; 486.5; 539.1; 278.9

Section 276 Decision

Judge:	The Honourable Justice Patrick J. Murray
Heard:	November 9, 2020, in Sydney, Nova Scotia
Oral and Written Decision:	November 30, 2020
Counsel:	Rochelle Palmer for the Crown Christa Thompson for the Applicant, Mr. R. Sean MacDonald for the Complainant

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Section 486.5 - Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not

be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice

Section 539.1 - Order restricting publication of evidence taken at preliminary inquiry
539 (1) Prior to the commencement of the taking of evidence at a preliminary inquiry, the justice holding the inquiry

(a) may, if application therefor is made by the prosecutor, and

(b) shall, if application therefor is made by any of the accused,

make an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(c) he or she is discharged, or
(d) if he or she is ordered to stand trial, the trial is ended.

Section 278.9 Publication prohibited

278.9 (1) No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 278.3;

(b) any evidence taken, information given or submissions made at a hearing under subsection 278.4(1) or 278.6(2); or

(c) the determination of the judge pursuant to subsection 278.5(1) or 278.7(1) and the reasons provided pursuant to section 278.8, unless the judge, after taking into account the interests of justice and the right to privacy of the person to whom the record relates, orders that the determination may be published.

By the Court:

Introduction

[1] This is an application by the Accused, R. R., pursuant to s. 276(2) of the *Criminal Code*.

[2] The Applicant, Mr. R., is charged that he did commit a sexual assault on P. R. contrary to s. 271 of the *Criminal Code*. He is also charged with assault upon P. R. contrary to s. 266(a).

[3] In this application, the Applicant seeks to introduce evidence of the Complainant's prior sexual history. Mr. R. submits that in these circumstances the evidence is both relevant and of significant probative value, which is not substantially outweighed by any prejudice to the proper administration of justice.

[4] In particular, the Applicant submits this evidence is crucial to allow Mr. R. to exercise his right to make full answer and defence. It is not, says the Applicant, being raised so as to offer evidence that would offend either of the twin myths, as contained in s. 276(1)(a).

[5] That section (as well as s. 276(2)(a)) deems inadmissible evidence that would support an inference that by reason of the sexual activity, the Complainant: a) is more likely to have consented to the activity that forms the subject matter of the charge; or b) less worthy of belief.

[6] In support of the Application Mr. R. has filed his own affidavit sworn August 10, 2020. In addition, he has filed the affidavit of Kelly Miller, sworn August 11, 2020, which attaches three exhibits:

a) Transcript of Ms. R.'s audio statement given to Cst. Ratchford on January, 2019.
b) Transcript of Ms. R.'s audio statement given to Cst. Ratchford on November 12, 2019.
c) Transcript of Ms. R.'s evidence at the preliminary inquiry.

[7] The specific evidentiary considerations put forward by the Applicant pertain to:

1) the past use of sexual aids such as sex toys and pornography;
2) sexual activity between the parties when not feeling well;
3) the withholding of sexual relations by the Complainant; and
4) his interpretation of body language and paraverbal sounds.

[8] In his affidavit Mr. R. addresses each of these categories of evidence which the Applicant propose to introduce and question the Complainant about.

[9] In paragraphs 16 and 17, Mr. R. explains he was introduced to sex toys by Ms. R. and believed they were exploring these aids together.

[10] In paragraph 14, while unable to provide specific dates or exact number of times, Mr. R. states they had engaged in relations in the past to help each other feel better, basing his belief on the logic of brain chemistry.

[11] Similarly, in other paragraphs Mr. R. disputes the narrative of the Complainant stating that in his view there were no gaps in their sex life, and that the attraction was mutual. (Paragraph 15)

[12] Further, the Accused states the Complainant was "receptive" based on his interpretation of her physical reaction. He says he recognized these sounds from their past experiences together. (Paragraph 12)

[13] The Applicant's counsel submits respectfully that it was the Complainant who raised these issues, in her statement to police and at the Preliminary Inquiry. They are relevant because the Complainant raises them when she tells her story. Without that, the Applicant says, he would have no reason to seek to adduce this evidence and cross-examine the Complainant on them.

[14] It is fundamental, says the Applicant, to the coherence of her narrative and the Court's ability to assess the Complainant's credibility, that this evidence be allowed. Why, for example, he would suggest sex when she was not feeling well, and further that he is not a deprived individual, which he claims her evidence makes him out to be.

[15] In short, he must be able to respond to the allegations, and is required under the rule in ***Brown and Dunn***, (1893), 6 R. 67 (H.L.), to put relevant questions to the Complainant in cross-examination.

[16] Mr. R. disputes her characterization of the evidence and says he must be able to respond. His counsel says, it boils down to him being able to make full answer and defence. The Court needs to understand what was on his mind. In paragraph 18, the Applicant states that their "sexual encounters were always based on mutual consent and love".

Crown's Position

[17] In its brief the Crown has provided a concise overview of the issues and its position on each. I will later address those issues.

[18] The Crown submits that questioning the Complainant about withholding sexual intercourse is simply not relevant to an issue at trial or the articulated defence of honest but mistaken belief in consent.

[19] With respect to the remaining categories, the Crown says, all of them lack the specificity required by the *Criminal Code*. Referring to cases such as ***R v. Mondesir***, 2011 ONSC 2716, and ***R v. Quesnelle***, 2010 ONSC 2698, simply alluding to the general nature of the relationship is not to give specific instances that the statute requires. This is to ensure the parties have adequate notice of the evidence sought to be introduced in order to properly respond.

[20] The Crown further submits the Applicant cannot rely on a "pattern of sexual relations", as this makes it difficult to assess the probative value of the evidence, and weigh it against potential prejudice to the administration of justice.

[21] Further, this leads, says the Crown, to an impermissible line of reasoning, that by virtue of a pattern of past activity, consent (or communicated consent) is less of an issue.

[22] Underlying this reasoning lies the ultimate bar, that past sexual encounters are inadmissible.

[23] The Crown submits that it too is prevented from adducing evidence of past sexual activity. Based on the cases of ***R v. Goldfinch***, 2019 SCC 38, and ***R v. Barton***, [2019] S.C.J. No. 33, it too would require an order from the Court to permit the type of evidence that the Applicant is seeking.

[24] The Crown has not done so here and counsel submits that the Court should keep this in mind when assessing the application.

[25] The Crown submits that the Applicant has not met the requirements for the proposed evidence to be produced under stage 1 or stage 2. It is neither capable of being admitted under stage 1 (s. 276(2)) nor had it established that it should be admitted under stage 2, considering the factors in s. 276(3).

The Position of the Complainant – P. R.

[26] The Complainant's counsel submits it that the fundamental reason for seeking to introduce this evidence is to rebut the evidence of the Complainant, based on the past sexual relationship between the Complainant and the Accused.

[27] Complainant's counsel acknowledges the position of the Crown, that evidence of past sexual history could only be introduced if the Crown (with a proper application) introduces it, and the Crown has agreed that it is not intending to do so. To that end, the Complainant says, the evidence at the preliminary plays no role in the Applicant refuting the evidence of the Complainant.

[28] The Complainant, therefore, says that, consent being the main issue, the fundamental issue is whether it was reasonable for the Accused to believe, through paraverbal communication and body language, that the Complainant communicated consent, and this evidence will provide direct insight into his belief.

[29] Referring to ***Barton***, the Complainant says the Applicant is asking the Court to engage in impermissible propensity reasoning. The introduction of this evidence suggests that the Court infer consent, or that consent was communicated to Mr. R.

[30] When you look at the evidence of what Ms. R. said, it was "no" submits, the Complainant's counsel. There was not an issue of paraverbal communication or body language.

"Only yes means yes" he says, as is made abundantly clear by the recent caselaw in ***Goldfinch*** and ***Barton***.

[31] In conclusion, the Complainant submits that positive affirmation is needed. The only by-product of this type of evidence is propensity reasoning which is impermissible.

[32] On the issue of consent, the Complainant says, the evidence is that there was none. In the result, she says the Application should be dismissed.

The Law

[33] The relevant sections of the *Criminal Code* are ss. 276(1), (2) and (3), as well as the related procedural provisions in ss. 278.93 and s. 279.94. I am not going to review those in detail.

[34] In brief, under stage 1 in s. 278.94, I must consider whether the evidence is capable of being admitted under s. 276(2), which includes a consideration of whether the evidence of sexual activity is relevant to an issue at trial, under (b); is of specific instances of sexual activity, under (c); and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice under (d).

[35] As per s. 276(1) and s. 276(2) these considerations only apply if neither of the twin myths, so called, is engaged.

[36] Under the *Criminal Code*, if the Applicant meets stage 1, the Court holds a hearing and decides pursuant to s. 278.94(4) whether the evidence or any part of it is admissible under s. 276(2) and shall provide reasons for that determination. Section 276(3) mandates that that factors contained in (a) to (h) therein be taken in account in that determination.

[37] In this case, I am satisfied that the application was made as required under ss. 278.93(1) and has met the requirements for an application under s. 278.93(2). That is not in dispute. Further, it was agreed that the Complainant was entitled to legal counsel and that the parties would make submissions on stages 1 and 2 at the same time, leaving the ultimate determination on whether these have been met to the Court for decision.

Brief Statement of Issues

1. Should the Applicant be allowed to adduce evidence about and cross-examine the complainant about the past usage of pornography and sex toys as sexual aids while having consensual sexual relations during the course of their relationship and marriage?

2. Should the Applicant be allowed to adduce evidence about and cross-examine the Complainant on her assertion that she had been withholding sex leading up to the allegation?

3. Should the Applicant be allowed to adduce evidence about and cross-examine the Complainant about their past participation in sexual relations when either party was sick with the goal of making that person feel better?

4. Should the Applicant be allowed to adduce evidence about and cross-examine the Complainant about past sexual activity that would have led to his belief that he had a reasonable understanding of her communication through body language and paraverbal communication?

Decision

[38] These categories of proposed evidence would lead the Court to examine the impact of past sexual behaviour on the expectations of the complainant and the accused on the date of the alleged offences. The Applicant has said that if these matters had not been raised by the Complainant, there would be no need for him to adduce evidence or cross-examine the Complainant. He submits that because these were raised by the Complainant, he must be able to respond to her narrative, and says his inability to do so will affect his credibility, and thus impede his right to make full answer and defence.

[39] The Applicant says the parties had used sex toys and pornography before, and therefore this is relevant to the present charges.

[40] In terms of cross-examining the Complainant about withholding sex, he submits that this depicts him as a depraved individual. This is simply not relevant, and is otherwise evidence which has low probative value.

[41] Continuing on, and in practical terms, whether the parties had sexual relations in the past, when feeling unwell as such is of no apparent relevance or probative value, when the law requires affirmative consent and the lack thereof as an essential element of the offence.

[42] With respect to these categories of proposed evidence, sex toys, withholding, and feeling unwell, I find the Applicant has not met the burden of establishing the requirements of s. 276(2), that the evidence is relevant and of significant probative value so as to substantially outweigh the prejudicial effect of leading evidence of this very private subject matter. The presumption that the evidence is inadmissible, therefore remains.

[43] Finally, there is the issue of whether the proposed evidence of body language and paraverbal communication is relevant to an issue at trial, and in particular, the Applicant's articulated defence of honest but mistaken belief in consent. In ***Barton***, this defence was recently described as a mistaken belief in *communicated* consent.

[44] Mr. R. wishes to adduce evidence and question the Complainant about past sexual activity, in particular his interpretation of body language and "paraverbal sounds" to suggest that P. R. was responding positively and communicating consent (see para. 12 of R. R. affidavit). Mr. R.'s position is that this was a shared consensual experience, and at no time did he doubt Ms. R.'s consent, or "enjoyment".

[45] In ***Barton***, the court discussed the Defence put forward by the Applicant here, stating that the principal considerations are: 1) the Complainant's communicative behaviour; and 2) the totality of admissible relevant evidence.

[46] Further, in its brief the Crown states:

> 20. The Application asks that this Court consider the evidence of another sexual activity, as it relates to his honest but mistaken belief in communicated consent. However, the Respondent submits that this evidence of other sexual activity supports only that the Accused believed the complainant consented to the sexual activity at another time when that specific sexual activity was occurring, and not during the allegations before the Court. (sic)

[47] In ***Goldfinch***, the court ruled that sexual history evidence sought to be admitted for context is insufficient, and it must be shown to be for some other important reason.

[48] It seems to me the reason here is to show sexual activity at another time, in an effort to provide context for what allegedly happened.

[49] I concur with the Crown's assessment that the obvious inference or implication is that the Complainant consented at another time. I concur with the Complainant and the Crown that this line of reasoning is improper and falls into the myths that s. 276 is attempting to avoid.

[50] In addition, and for the same reason, I am of the view that the probative value of the evidence is substantially outweighed by the prejudicial effect of this type of evidence, which seeks to disclose intimate details of the Complainant's past sexual activity.

[51] I find the evidence of consent or communicated consent that is relevant is that at the time the alleged event was occurring, which must be conveyed in clear and unequivocal terms.

[52] Otherwise the evidence is inadmissible, unless the Applicant establishes that the requisites of s. 276(2) have been met.

[53] The Crown says the proposed evidence lacks the specificity required by the s. 276(2)(c), but also is overly broad in allowing the most intimate details of the Complainant's past behaviour. The Crown states the law is clear affirmative consent is required.

[54] The Complainant refers to ***Barton***, where the Supreme Court of Canada stated at paragraph 94:

> The accused cannot rest his defence on the false logic that the complainant's prior sexual activities, by reason of their sexual nature made her more likely to have consented to the sexual activity in question, and on this basis he believed she consented.

[55] I concur that this reasoning is applicable here so as to exclude the evidence of past sexual activity sought to be introduced.

[56] With respect to the Crown's assertion that the evidence of specific instances is lacking, the Applicant says the proposed evidence is no more general than that given by the Complainant herself, and that they are seeking only to respond to that evidence.

[57] Generally, I find that all of these instances put forward by the Applicant lack the specificity required by s. 276(2)(c). Further, given that it is affirmative consent that is required, I find both the probative value and relevance of this evidence is questionable.

[58] Much of the proposed evidence appears likely to run afoul of the Supreme Court of Canada's warnings about reasoning based on myths, and would likewise run afoul of the intentions of the relevant *Criminal Code* provisions.

[59] In the result, the Application is dismissed at the first or threshold stage of the inquiry. I find it is not capable of admission pursuant to s. 276(2) as required by s. 278.93(4).

[60] Even if I had found that all or any part the proposed evidence had met the first stage, there are definite concerns with admission of the evidence when the factors in Section 276(3) are applied. The Applicant's application pursuant to s. 276 is dismissed.

[61] This concludes my decision.

Murray, J.