SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. K.D.N.*, 2024 NSSC 83

Date: 20240321
Docket: CRH 521597
Registry: Halifax

Between:

His Majesty the King

v.

K.D.N.

SECTION 276 (STAGE 1) APPLICATIONS DECISION
PUBLICATION BAN: s. 486.4 and s. 486.5 of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: March 18, 2024, in Halifax, Nova Scotia

Counsel: Jillian Fage, for the Crown
Patrick MacEwen, for the Defence

By the Court:

[1] K.D.N. has been charged with two human trafficking offences, uttering a threat, assault, assault with a weapon, and sexual assault. The Crown alleges that between September 2018 and July 2021 K.D.N. and the complainant, J.M., were involved in a common law relationship. J.M. became pregnant in September 2018 and eventually moved into his home. The Crown says that the evidence at trial will show that during the relationship K.D.N. physically and sexually assaulted J.M. and forced her to perform degrading acts. The Crown says that he began talking with J.M. about performing at a strip club in New Brunswick. She worked there for a year. He took all the money that she earned. He later began taking her to New Brunswick on weekends where she would work Friday through Sunday and come back to Nova Scotia for her to work at her weekday job in a daycare. The Crown says that K.D.N. again took all the money that J.M. earned in the club.

[2] Mr. MacEwen, counsel for the accused, has made an application under s. 276 of the *Criminal Code* to permit the admission of evidence at the trial about J.M.'s prior and subsequent employment in the "exotic dancing industry". K.D.N.'s affidavit, filed with the application, says that during his relationship with J.M. she lost her job at the daycare and needed to provide for herself and her family. He says that on her own accord, she reengaged with exotic dancing, in New Brunswick and Newfoundland. He wants to put forward evidence to show that J.M. had been an exotic dancer before her relationship with him and did that work once again, after her relationship with him. The inference that he will ask the court to draw is that her previous involvement in exotic dancing makes it less likely that K.D.N. controlled her or coerced her into doing that again.

Issues

[3] The first issue is whether s. 276 applies to charges of human trafficking or exploitation.

[4] If s. 276 is engaged, the issue is whether the evidence of J.M.'s employment as an exotic dancer is capable of being admitted in evidence so that the application should proceed to the second stage.

Application of Section 276 to Human Trafficking Offences

[5] Mr. MacEwen, on behalf of the accused, says that the evidence about J.M.'s employment as an exotic dancer would only be used on the human trafficking

charges. It would not be used with respect to the sexual assault charge. The human trafficking charges are not listed in s. 276(1), so that the procedures under the section do not apply when considering human trafficking charges. He has made the application out of an abundance of caution.

[6] The issue has been debated at some length in Ontario but there does not appear to be guidance from the Ontario Court of Appeal or from appellate level courts in other provinces on the issue. In *R. v. S.M.*, 2023 ONCA 417, at para. 15, the Ontario Court of Appeal acknowledged the conflicting caselaw but declined to resolve the issue based on the record in that case. Some judges have concluded that because human trafficking is not an enumerated offence in the *Criminal Code* the s. 276 regime does not apply. Other judges have focused on the direction from the Supreme Court of Canada in *R. v. Barton*, 2019 SCC 33, that the language of s. 276 should be read broadly so that it applies to cases in which the charge has a "connection" to one of the enumerated offences. The question then is whether that connection is based on the elements of the offence or on the facts of the case.

[7] In *R. v. Europe*, 2023 ONSC 5322, the accused was charged with human trafficking offences and assault. The complainant had known Mr. Europe for several years and became involved in a romantic relationship with him. She said that once she was involved in a relationship with him, he controlled the amount of time that she spent working providing sexual services at a spa where she was employed and forced her to give him all the money she earned. When she tried to leave him, he assaulted her and threatened her and her family.

[8] Mr. Europe's counsel wanted to ask the complainant whether she was employed at the spa providing sexual services in the time just before she began a relationship with Mr. Europe and whether she continued to do so after she left him, and he was charged. He did not intend to ask her about the nature of any sexual acts she engaged in. His counsel argued that the questions were relevant to the issue of whether Mr. Europe had procured the complainant into providing sexual services for consideration.

[9] The court noted that s. 276(1) applies "in respect of" certain enumerated offences. In *Barton,* at paras. 70-77, Moldaver J. explained the meaning of the term and concluded that the section was not restricted to cases where the accused is charged with one of the offences enumerated in that subsection. The phrase "in respect of" suggests a very wide scope. It means "in relation to", "with reference to", or "in connection with". Parliament would not have chosen this exceptionally

broad language if it intended to limit the application of the s. 276 regime to proceedings in which a listed offence was expressly charged. Moldaver J. was of the view that the s. 276 regime applies to any proceeding in which an offence listed in s. 276(1) has “some connection to the offence charged”, even if no listed offence was particularized in the charging document. That “broad relational test” would be satisfied where the listed offence was the predicate offence for the offence charged or an included offence of the offence charged. In the *Barton* case, the regime was engaged because the offence charged, first degree murder, was premised on sexual assault with a weapon which is an offence listed in s. 276(1). That alone was sufficient to engage the s. 276 regime.

[10] Justice Schreck in *Europe* noted that the applicability of s. 276 to human trafficking offences was the subject of several decisions in the Ontario Superior Court of Justice. The issue depended on whether prosecutions for such offences were "proceedings in relation to" one or more of the enumerated offences, as that term was explained in *Barton.* Justice Schreck listed the decisions, as of September 2023, in which it was concluded that s. 276 did not apply: *R. v. Williams*, 2020 ONSC 206; *R. v. M.D.*, 2020 ONSC 951; *R. v. Langford*, 2021 ONSC 4307; *R. v. Galastica* (unreported, February 6, 2023, Ont. S.C.J.); *R. v. R.G.*, 2023 ONSC 5064. The decisions in which it was concluded that s. 276 did apply were: *R. v. Celestin* (unreported, June 5, 2019, Ont. S.C.J.); *R. v. Floyd*, 2019 ONSC 7006; *R. v. T.A.*, 2020 ONSC 6714; *R. v. MacMillan*, 2021 ONSC 3952; *R. v. Maldonado Vallejos*, 2022 ONSC 2753; *R. v. Campbell* (unreported, January 6, 2022, Ont. S.C.J.); *R. v. Ryckman*, 2022 ONSC 20; *R. v. Hamblett* (unreported, May 13, 2022, Ont. S.C.J.); *R. v. Lees*, 2023 ONSC 124; *R. v. N.G.*, 2023 ONSC 792.

[11] Justice Schreck considered the first of those, *R. v. Williams*. That was the case that others followed. In *Williams*, Stribopoulos J. considered whether the proceedings could be said to be "in respect of" any of the enumerated offences and concluded that s. 276 was not applicable in the circumstances of that case. The accused was not charged with an offence listed in s. 276(1). A listed offence was neither a predicate nor included offence for any of the charges the accused faced. A listed offence is not “implicated” in the proceeding.

[12] The judge rejected the Crown's suggestion that the requisite connection to a listed offence existed because the accused faced a charge of procuring by exercising "control, influence or direction". The Crown argued that in such circumstances, any resulting sexual activity took place without "consent". Stribopulos J. said that would conflate the more stringent requirement for

concluding that consent to sexual activity has not been genuinely and freely given, with the less exacting demands for the *actus reus* of the procuring offence found. The s. 276 regime was found not to apply.

[13] Justice Schreck noted that the current state of the law in Ontario with respect to this issue demonstrated the importance of the doctrine of horizontal *stare decisis* and its promotion of "rule of law values such as consistency, certainty, fairness, predictability, and sound judicial administration". While it would be ultimately for an appellate court to determine whether *Williams* was correctly decided, as things stood in September 2023, it represented the law in Ontario.

[14] Not all Ontario judges have agreed. In *R. v. Maldonado Vallejos*, the accused was charged with human trafficking offences. The complainant testified about text messages exchanged and other discussions that she had with Mr. Maldonado. She described how he spoke about contacting other women for the purpose of procuring them to engage in sex work. The accused wanted to cross-examine the complainant and to testify about evidence of a sexual nature involving her. He was charged with human trafficking, procuring sexual services for consideration, advertising sexual services, receiving material benefit from human trafficking, assault, assault with a weapon, forcible confinement, and two counts of criminal harassment. None of these offences are enumerated in s. 276. Justice Braid in *Maldonado Vallejos* said that did not end the matter. In *Barton*, the Supreme Court of Canada directed that the assessment of the applicability of the s. 276 regime to non-enumerated offences must be undertaken from a generous perspective and with a broad interpretation of which offences may be considered to have a connection to an offence listed in s. 276. The words "in respect of" a listed offence suggest the widest possible scope.

[15] Evidence of the complainant's sexual history has been used to discredit complainants on the basis of myths and stereotypes. This has been especially true of sex workers, who are a particularly vulnerable group. The s. 276 regime was enacted to protect trial integrity by excluding irrelevant and misleading evidence, to protect the accused's right to a fair trial by creating a framework under which a complainant's evidence can safely be received and will be admitted, and to protect the security and privacy of complainants and thereby encourage the reporting of sexual offences. Giving s. 276 a broad, generous interpretation that does not unduly restrict the regime's scope of application will best achieve these objectives.

[16] Sex trade workers, who are influenced, directed, controlled, or exploited, are not independent. They are a highly vulnerable population, hesitant to report and/or engage in the justice system, under regular circumstances. The "power and breadth" of the language in *Barton* demonstrates that the s. 276 regime is intended to apply to sex work offences and pimping-related charges. Justice Braid concluded that human trafficking offences are connected to the enumerated offences in s. 276(1) because of the sexual nature of the offences and the element of sexual exploitation, to which there can be no consent.

[17] Justice Braid considered *Williams* and *Langford*. They were distinguished because they did not involve human trafficking charges under s. 279.01. But even if those decisions were to be considered by analogy, the reasons "stand in stark contrast to the overwhelming weight of judicial authority in which s. 276 has been found to apply to human trafficking offences" (para. 23).

[18] In this case, the indictment charges K.D.N. with sexual assault, among other offences. Justice LeMay in *R. v. Y.S.*, 2021 ONSC 2836, concluded that because the applicant had been charged with one count of sexual assault, which is listed under s. 276, the procedures under s. 276 should apply to all the charges. Furthermore, in this case, the Crown asserts that the evidence at trial will show a course of behaviour in which the sexual assault, along with other assaults and threats, accompanied what it alleges were K.D.N.'s actions to control, coerce and exploit J.M. The charge of sexual assault is connected to the charges of human trafficking and exploitation, as the term is used in *Barton.* That is so because human trafficking as noted in *Maldonado Vallejos* is an offence with a sexual aspect predominantly though nor exclusively, against a vulnerable group of women whom s. 276 protections were designed to protect and because, in this case, the connection is made more direct by the inclusion of a sexual assault charge on the same indictment.

Is "Exotic Dancing" Prior Sexual Activity?

[19] Mr. MacEwen argues that the evidence he wants to adduce is not evidence of prior sexual activity so that s. 276 is not engaged. J.M. worked as an exotic dancer or stripper. While that may be interpreted as a form of "sex work" he argues that it is not sexual activity. The term is not defined in the *Criminal Code*. There is no physical contact with any other person. Ms. Fage, on behalf of the Crown proposed that judicial notice be taken of the "fact" that in businesses where exotic dancing takes place, physical sexual contact is common, if not in public places,

then in private places set aside for lap dancing or private dancing. There has been no evidence led with respect to what takes place in most, some, or all "strip clubs". It is not so notorious a fact that it can be assumed. It is not something that "everyone knows".

[20] Exotic dancing, for purposes of this application, is limited to a paid performance in which a person may remove some or all their clothing and dances or moves in a way that is seductive, erotic, or sexually stimulating. Even if there is no contact with any other person, its purpose is primarily and predominantly sexual. Whether it is a sexual activity as contemplated by s. 276, can be best resolved by having regard to the purposes of the s. 276 regime. The purpose is to eliminate the use of myths and stereotypes about sexual violence and the "kinds of people" who are the complainants in those cases. Sex trade workers have been acknowledged to be a highly vulnerable population. Strippers or exotic dancers are included in that group. People have been willing to make stereotypical assumptions about them. There is a social stigma that is applied to them. That stigma applies to those who engage in work in which they are paid to provide services that are primarily or predominantly sexual. That includes exotic dancing.

[21] Section 276 applies to this case.

Capable of Being Admitted

[22] The first stage of the s. 276 process is an application for a hearing.

[23] The judge must determine whether the application was properly filed, with sufficient notice having been provided and whether the evidence is "capable of being admissible under s. 276(2)". That does not involve the application of the criteria set out in s. 276(2). It is whether this is a matter that should even be referred to that second stage.

[24] In *R. v. D.S.*, 2021 NLSC 25, Justice Burrage of the Newfoundland and Labrador Supreme Court reviewed the caselaw on stage one and commented on what is required.

> 14. At this threshold stage I am guided by the remarks of Doody J. in *Bakarat* (at paragraph 18), as recently endorsed by Stack J. of this court in *R. v. J.E.*, 2019 NLSC 134 (at paragraphs 49-50.)
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> > 49. As to the first phase analysis itself, Doody J. points out at paragraph 18 that:

> 18. Sub-section 278.93(4) entails only a facial consideration of the matter and a tentative decision concerning the capability of the evidence being admissible. Courts should be cautious in limiting the defendant's rights to cross-examine and adduce evidence. Unless the evidence clearly appears to be incapable of admissibility, having regard to the criteria of section 276(2) and the indicia of s. 276(3), the court should proceed to the second stage and hold a hearing under s. 278.94. Any doubts under s, 278.93(4) are better left for decision on the evidentiary hearing under s. 278.94. (*R. v. Ecker* (1995), 96 C.C.C. (3d) 161 (Sask. C.A.); *R. v. B. (B.)*, [2009] O.J. No. 862 (Ont. S.C.).

[25] It is not a perfunctory review. It has a real purpose. The judge must consider whether there are any reasons why the evidence, on its face would not be capable of being admitted. The weighing of factors is properly done at the next stage. "Capable of being admissible" in stage one, is not the same thing as being admissible at stage two. And admissibility of evidence at stage two should not be conflated with its ultimately being found to be reliable or given significant or any weight at the trial.

[26] Evidence is not "capable of being admissible" if its purpose is to support the inference that the complainant is more likely to have consented to the activity that forms the subject matter of the charge or is less worthy of belief. If evidence is put forward for that purpose, there is no weighing that needs to be done. The attempt to use it is stopped at stage one. In this case, with respect to the human trafficking charges, consent is not an issue, but coercion and control are. Evidence is not capable of being admitted if it is not evidence of specific instances of sexual activity. If evidence is being put forward about the complainant's sexual history in general, again, there is no weighing to be done. The process does not get past stage one. If the evidence is being put forward is not relevant to an issue in the trial, it is not capable of being admitted. There would be no need to involve the complainant in the process and allow for evidence to be led. If the evidence is not relevant it is not capable of being admissible.

[27] Evidence is capable of being admissible if it has significant probative value and that probative value is not outweighed by the danger of prejudice to the proper administration of justice. That requires a nuanced consideration of the evidence sought to be used and circumstances of the case including the circumstances of the complainant. There may be cases in which evidence is not adduce for the purpose of advancing "twin-myths" reasoning, is relevant to an issue at trial, and is about a specific instance of sexual activity but may be stopped at stage one. That would be

because the nature of the evidence is such that on its face it can be determined that its probative value is not "significant", and its value is substantially outweighed by the danger of prejudice to the proper administration of justice.

[28] K.D.N. filed an affidavit in which he says that J.M. lost her job in 2018 and told him that she would have to go back to being a stripper. He also says in the affidavit that he had known that J.M. was employed as a stripper prior to his involvement with her and continued to work as an exotic dancer after their relationship ended. If the evidence is to be admitted, the court must be clear and remain clear about why the evidence is being admitted. The defence says that the evidence has significant probative value because it goes to "the complainant's independent decision to engage in the profession of exotic dancing". The purpose as proposed is to show that because J.M. had been an exotic dancer before, it is more likely that she went back into that work without any coercion, direction, or influence from K.D.N. As noted in the application, the evidence "contradicts the allegations of exploitation and control".

[29] The contradiction arises only with the use of stereotypical reasoning. It suggests the inference that because J.M. had been an exotic dancer in the past, she is more likely to have agreed to return to exotic dancing as her own choice, without coercion, exploitation, or control by K.D.N. That would raise the collateral issue of whether, when involved in exotic dancing before, it had been of her own volition or whether she had been coerced by someone other than K.D.N.

[30] The issue has been examined in the context of those involved in other sex work, specifically prostitution. In *R. v. Desir*, 2020 ONSC 1158, the accused wanted to lead evidence about the complainant's prior work at a spa where she offered sexual services for money. The accused argued that the evidence was relevant to whether he had recruited her into the sex trade or whether she had become involved voluntarily. He said that it would help to show that she had the opportunity, knowledge, and desire to work for herself in that industry. The court held that, in substance, that was saying that because the complainant had voluntarily engaged in the sex trade at a spa, it was more likely that she would have done so during the time of her involvement with him. Justice Monahan of the Ontario Superior Cout of Justice said that it would be difficult to conceive of a clearer instance of twin-myth reasoning than the proposition that because the complainant had been involved in the sex trade voluntarily in the past, it was more likely that she would have done so in respect of the incidents forming part of the charges.

[31] The court in *R. v. A.M.*, 2019 ONSC 7293, reached the same conclusion with respect to the complainant's prior sex trade work. The position appeared to be that because the complainant was already a sex trade worker, she was less likely to be coerced or exploited to perform the specific sex trade work that formed the basis of the human trafficking charge. The fact that the complainant was a sex trade worker did not have any relevance to the charges faced by the accused.

[32] In *R. v. Simeu*, Ontario Superior Court of Justice, August 24, 2022, (unreported), the accused claimed that the complainant was already working in the sex trade as an escort when he met her. He was charged with human trafficking offences. Justice Chozik concluded that evidence of prior involvement in the sex trade breeds twin-myth reasoning that the complainant was more likely to be engaged in the sex trade because of her previous involvement and less likely to be credible. The line of questioning would invite the trier of fact to conclude that because the complainant had worked in the sex trade before, she was more likely to have been working in the sex trade without being the subject of control, direction or influence of the accused.

> Once a willing participant in the sex trade, always a willing participant in the sex trade goes the impermissible thinking. This reasoning is exactly like the reasoning that once consenting to sexual activity always consenting to sexual activity or that an unchaste woman is less worthy of belief. The entire Section 276 regime is aimed to guard against that line of reasoning from derailing and distorting the trial process. (p. 52)

[33] The court goes on to note that consent is not a defence to human trafficking or procuring and not a defence to advertising someone else's sexual services. It is entirely irrelevant to receiving a benefit from human trafficking or procuring. Whether the complainant was or was not willing to do that sex trade work is generally not relevant. Defence counsel in that case argued that the evidence was needed to balance the "moral portrait of the accused" so that the complainant could not be portrayed as a vulnerable person who was trying to get help and get out of the sex trade. Justice Chozik disagreed stating that this was an obvious attempt to disparage the character of the complainant because of her prior involvement with the sex trade and that was precisely what s. 276 was intended to prevent.

[34] Other Ontario judges have reached another conclusion. In *R. v. Floyd*, the applicants were charged with distribution of child pornography; advertising sexual services; receiving a material benefit from sexual services; recruiting a person under the age of 18 to provide sexual services; recruiting for the purpose of

exploitation; and, exercising control for the purpose of exploitation a person under the age of 18. Mr. Floyd was also charged with confining a person, and assault causing bodily harm. The applicants wanted to cross-examine the complainant about her sexual history, limited to whether she had engaged in prostitution in the two weeks before the alleged incidents. The Crown argued that the applicants had not shown how escorting in the two weeks before was relevant to a defence the applicants wanted to assert. The Crown said that the applicants simply wished to embark on a fishing expedition that would engage the myth that the complainant was less worthy of belief and that the proposed evidence did not have significant probative value. Justice Roger held that the proposed evidence went to whether the complainant was recruited, and to her credibility and reliability arising from possible inconsistent statements.

[35] Whether the complainant engaged in the escort business during the two weeks before the alleged incidents was held to be relevant to whether she was recruited. Whether the complainant was recruited is fact specific, and whether the complainant was previously involved in the escort business was a relevant factor to consider when deciding whether she had been recruited. To "recruit" someone is defined as persuading or helping someone to do something or to enlist or get someone involved. Whether the complainant was involved in prostitution just prior to the alleged incidents was relevant to whether the applicants recruited the complainant for purposes of engaging in prostitution with them, which is an element of the offence charged. Something is relevant if it makes a fact which is in issue more or less likely, and something that is relevant is relevant even if the answers to the proposed questions are unknown.

[36] In that case the proposed evidence was linked to whether the complainant was recruited by the applicants. The complainant had given a statement to the police. How she was recruited was part of the *actus reus* of the offences. The defendants said that they had not recruited the complaint at all. From her statement it appeared possible that how she was allegedly recruited was connected to her prior activities as an escort. Justice Roger noted that it would be difficult for the applicants to effectively challenge the Crown's contention that the complainant was recruited without cross-examining the complainant about those conversations. An effective cross-examination about those alleged conversations could hardly be conducted without some reference to the complainant's prior activities as an escort just before the alleged incidents.

[37] The proposed cross-examination was relevant to whether the complainant was a reliable or credible witness given her evidence about the issue of her work as an escort. The complainant had said that she "did it once or twice before I met them" and at the preliminary inquiry she responded "no" to whether she had done it before. Similarly, in cross-examination at the preliminary inquiry she indicated that she did not say that she had done it before.

[38] Justice Roger held that the proposed evidence went directly to an element of both human trafficking offences. The probative value of the evidence was high because the Crown was required, to establish that the applicants recruited the complainant. The proposed evidence was a factor to consider when determining whether recruitment had been established. The proposed evidence could be directly relevant to whether the complainant was a credible or reliable witness, not because of the prior sexual activity, but to assess whether she gave inconsistent answers affecting her credibility or reliability.

[39] In *R. v. Amdurski*, 2022 ONSC 1337, the accused relied on *Floyd*. He was charged with human trafficking offences with respect to a 13-year-old complainant. He wanted to cross-examine her about her employment in the sex trade at the time he met her. He claimed that she had continued to be employed independently during the time that he was accused of having trafficked her. He argued that the information was relevant to whether he had procured her and was exercising control and direction over her. The Crown conceded, based on *Floyd*, that the fact that the complainant had been employed in the sex trade “at the time” she met the accused met the test at stage one. Justice Molloy expressed concern about the expression “at the time” but agreed that the alleged activity must be proximate in time to the offence dates to have any relevance to the offences charged. In that case the evidence relied upon by the defence was an email and text message referring to sex work. These were sufficiently proximate to the time that Mr. Amdurski met the complainant, less than a week later.

[40] At the second stage Justice Molloy allowed the evidence to be admitted. The judge noted that it was clear that Mr. Amdurski’s defence centred on his alleged belief that the complainant was previously involved in sex work and “wanted to continue in that work” (para. 53).

[41] What is notable about both *Floyd* and *Amdurski* is that both deal with situations in which the defence was that the complainant had not been recruited or coerced into the sex trade because she was already involved in that trade. There is

no evidence on this application to suggest that J.M. was at the time that the alleged human trafficking offences occurred, already working as a stripper or as an exotic dancer so that she could not have been recruited by the accused for that purpose. The argument is that because she had worked as an exotic dancer before she was more likely to have worked as an exotic dancer again, without coercion or control being exercised over her.

[42] The evidence that J.M. had in the past been an exotic dancer is probative to an issue at trial, coercion or control, only if one accepts that because she had been an exotic dancer it is less likely that K.D.N. exercised control over her or coerced her into becoming an exotic dancer later. That relies in impermissible reasoning. If J.M. had been coerced or forced into being an exotic dancer in the past, it does not make it less likely that she was coerced or forced to do so by K.D.N. If J.M. had been an exotic dancer in the past without coercion by anyone, it does not make it less likely that she was coerced into doing so by K.D.N. To make the inference that past voluntary involvement makes her "the kind of person" who would become involved in exotic dancing again, or more inclined to be involved in exotic dancing, is precisely the kind of reasoning that s. 276 is designed to protect against.

[43] Section 276 applies in this case. The evidence sought to be admitted is not capable of being admitted. There is no requirement for a second stage hearing.

Campbell, J.