SC CR 94 003

CR 02483

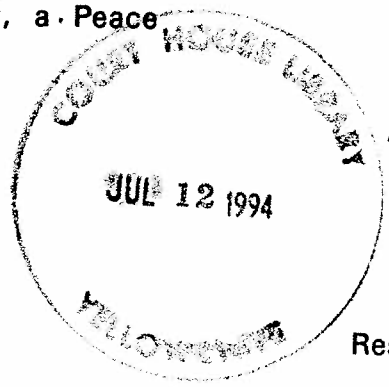
IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN
on the information of Constable Thomas Arthur Caverly, a Peace Officer

Appellant

- and -



RORY GILLIES

Respondent

Appeal by the Crown against acquittal of a charge of sexual assault dismissed.

Heard at Yellowknife on May 18th 1994

Judgment filed: May 20th 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Appellant: Ms. Louise Charbonneau

Counsel for the Respondent: John U. Bayly, Q.C.

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REASONS FOR JUDGMENT

1 The two questions of law raised by the Crown in this appeal against the respondent's acquittal of a charge of sexual assault, contrary to s.271 of the **Criminal Code**, are as follows:

1. Did the trial judge commit reversible error in law in misdirecting himself as to the issues of credibility and proof of the elements of the offence charged beyond a reasonable doubt?

2. Did the trial judge commit reversible error in law in admitting evidence contrary to s.276 of the **Criminal Code**?

I. The s.276(2) Question

1. Section 276

2 This section reads:

276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, 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.

(2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall 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 276.1 and 276.2, that the evidence

(a) is of specific instances of sexual activity;
(b) is relevant to an issue at trial; and
(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(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.

2. The evidence

The evidence led by the Crown at trial showed that the complainant and the respondent accused were married in 1985, having lived together as man and wife some three years before that. They had separated in February 1993. The assault charged against the respondent allegedly occurred in August 1993.

4 In her examination-in-chief by Crown counsel at trial, the complainant was asked how often she and the respondent had seen each other or had contact between February and August 1993. Her response was "Occasionally". Under further questioning by Crown counsel, the complainant was led to indicate that their contacts during this period had been primarily of a business nature. Nevertheless, the complainant saw fit to mention that the respondent had approached her in June 1993 in an attempt to bring about a reconciliation but that, after a week of consideration, she had told him of her intention to proceed with the divorce. Asked by Crown counsel: "So, there was no bad feeling between you?" The complainant answered "No".

5 Given this evidence as background, it is not difficult to appreciate that counsel for the respondent sought to cross-examine the complainant so as to bring out a fuller picture of the nature of the relationship between the couple on the date of the alleged assault as it had developed, more particularly since their separation in February 1993. He therefore questioned her about how they communicated with one another through a third party and as to her visiting him out at his place on Madeleine Lake, travelling by car, whereupon she found him in bed reading, discussed certain matters of a business nature with him and departed.

The complainant also recollected a visit made by the respondent to her place

in town at night, at which time he came in and she did not then ask him to leave. Under further questioning by counsel for the respondent, she recalled having hugged and given comfort to the respondent who was weeping. She denied that they then went into the bedroom, saying that they remained on the couch in the living room. She agreed that this was not a "business contact" but a "personal contact" between them. She had no recollection of any mention of sex or any attempt at sexual intercourse. And she admitted that they laid themselves down on the couch and embraced each other, being very close physically but without any contact with bare skin.

7 Counsel for the respondent then sought to question the complainant about suggested activity in the bedroom, to which Crown counsel responded by asking as to its relevance. Respondent's counsel informed the court that he was only laying a foundation for later testimony of the respondent which he expected to adduce as to the issues of consent and mistake as to belief in consent in the circumstances of the alleged assault, referring (among other things) to s.273.2 of the **Criminal Code**. Section 276 of the Code was not expressly mentioned; but Crown counsel did indicate that she relied on the prohibition in that section of any reference to past sexual conduct on the part of the complainant, taking the position that no such reference could be made by the defence.

8 No mention of an application under s.276.1 and s.276.2, as required by s.276(2) of the Code, was made by either counsel or by the trial judge. Nonetheless, the issue of admissibility was argued, in principle, and was resolved by the trial judge, without any reference to the procedural requirements of s.276.1 and s.276.2. The trial judge ruled that the cross-examination of the complainant as to any sexual activity on the night

in question, towards the end of May 1993, could continue, which it did.

9 Later in the course of the complainant's cross-examination, s.276 was expressly mentioned by Crown counsel, who again sought to restrict the cross-examination to events on the date of the alleged offence, arguing that the issue of consent should be decided without any reference to what may have taken place earlier between the complainant and the respondent, more particularly anything suggestive of a pattern of sexual conduct or communication between them. Once again, Crown counsel's objection was overruled, this time on a rather different basis since the questions were not, at this point, directed at past sexual conduct but rather at the complainant's concerns in May 1993 about the respondent's emotional state at that time.

10 During the respondent's examination-in-chief at trial he mentioned, among other things, a remark which he attributed to the complainant in reference to her sexual activities, when they met at her home in late May 1993. Crown counsel objected to this and, in the ensuing discussion, mentioned that notice had not been given by the defence (pursuant to s.276.1 of the Code) with respect to any such evidence. On behalf of the defence, however, it was pointed out that this evidence, though inadmissible for the fact that any such activities had occurred (both under s.276 and the hearsay rules), was nevertheless admissible as to the complainant's credibility, with specific reference to her denial that she had made any such remark.

3. The effect of the evidence of past sexual activities

When it came to final submissions by counsel in argument before the trial

judge, Crown counsel asked the trial judge to rule on the admissibility of "what the accused says happened on the May incident", having reference to s.276 of the **Criminal Code**. Crown counsel argued that the evidence of the complainant in that connection was however admissible and asked the trial judge to accept it; but, at the same time, asked him to disregard the evidence of the respondent accused on the events of that night, if only on the ground that his evidence was, by virtue of s.276(1), inadmissible with respect to sexual activities of the complainant other than in direct relation to the alleged assault itself. As I understand the Crown's position then, and on this appeal, the evidence of the accused in reference to the events in May could not properly be used at trial, and is not to be used now on this appeal, even only in relation to any assessment of the credibility of either the complainant or the respondent accused.

12 On behalf of the defence, it was submitted that s.276 of the Code is to be read in the context of s.273.1, which states:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;
>
> (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

> (3) Nothing in subsection (2) shall be construed as limiting the circumstance in which no consent is obtained.

13 The defence submission, if I do not mistake it, is that the words of subsection 273.1(1) of the Code, when read in the context of paragraphs 273.1(2)(d) and (e), in the event that they apply in this case, give "consent" a meaning which is to be understood in terms of non-verbal conduct as well as in verbal terms. In a case such as the present, where the parties have spent years together as a married couple, the events of an encounter between them must be regarded not only objectively (as by an independent observer) but subjectively (as by the parties themselves), at least where it comes to reaching a judicial determination on the issue of consent or its absence in reference to sexual activities between them. Body language, facial expressions, demeanour and gestures may speak louder than words (or their lack) to a long-married couple. It is on this basis that the defence says that the trial judge did not err by admitting the evidence of the events in May 1993.

4. Discussion

14 With deference I cannot accept the submission that s.276 of the **Criminal Code** is in any way modified or displaced by s.273.1. Where, as in this case, the defence seeks to adduce evidence (whether in response to questions put by counsel, or otherwise) of the past sexual activity of the complainant with the accused or anyone else, the requirements of s.276 are clear. And where the requirements of s.276.1 have not been met, as they were not met in this case, the trial may be adjourned if the trial judge considers it necessary to do so in the interests of justice so as to allow that to be

accomplished. Counsel for the defence could not rely, in this case, on the fact that the Crown had led evidence of certain contacts between the respondent accused and the complainant, characterising these as having been primarily of a "business" nature, so as to justify disregard for the requirements of s.276.

15 The Crown is of course expected to be fair and to strive for fairness by not obliquely holding back evidence which might favour the accused, particularly where the evidence withheld goes to the central issues of non-consent and knowledge of lack of consent in a case of sexual assault. Section 276 was not enacted in order to relieve Crown counsel of this responsibility. Its purpose is to protect complainants from needless exposure of their prior sexual history where that history or any incidents in it have no relevance to any issue in the proceedings before the court. Parliament intended that complainants should not be deterred from bringing their complaints of sexual assault to the attention of the proper authorities by fear of exposure of their sexual activities in general or in any non-material particular. But these considerations must be, and are in my opinion, always subject to the requirements of a fair trial as guaranteed by, among other things, s.650(3) or s.802(1) (as the case may be) of the **Criminal Code** and s.7 and s.11(d) of the **Canadian Charter of Rights and Freedoms**.

16 Although I take the view that this was a case where the Crown, in the larger interests of justice, could have led the evidence of the complainant on which the defence sought to rely or could, at least, have waived the requirements of s.276.1 and s.276.2 of the Code so as to allow the defence to do so, the fact that the Crown chose not to see its duty in that light did not excuse the defence from compliance with those provisions if it sought, as it did, to adduce evidence otherwise prohibited by s.276.

Be that as it may, considering the evidence as a whole and the manner in which the admissibility of the allegedly objectionable evidence was argued and decided, I fail to see that this evidence would have been ruled inadmissible had the proper steps in reference to s.276 been taken. And I remain entirely unpersuaded that any undue prejudice to the Crown or to the complainant was occasioned by the admission of that evidence in the non-jury trial under consideration. What occurred was clearly a procedural irregularity which should have been avoided even at the cost of an adjournment, in view of what I see as the unduly narrow conception of her duty by Crown counsel in the first part of the trial (not counsel on this appeal). On another occasion, with facts different from those in this case, the failure to comply with s.276 could be fatal. That it was not fatal in this instance is therefore not to be taken as a general precedent in future cases.

5. Conclusion

18 In the circumstances, the trial judge should have adjourned the trial to enable Counsel for the respondent to make the necessary application pursuant to s.276.1 if that was regrettably made necessary due to the Crown's position. Had that been done, it is abundantly apparent that the application would have succeeded, as it should have. In the result, the procedural irregularity did not give rise to any prejudice to the Crown or the complainant. By overlooking that irregularity, it cannot be said that the trial judge allowed an injustice to occur. This ground of appeal therefore fails.

II. The Misdirection Question

1. The credibility issue

19 In view of my conclusion with respect to the s.276 question, I am unable to hold that the procedural error made by the trial judge in relation to that question resulted in any prejudice to the Crown in reference to the trial judge's assessment of the credibility of the complainant.

20 In his reasons for judgment acquitting the respondent accused, the trial judge paid particular attention to this feature of the case, saying:

> In answer to concerns expressed previously by counsel, I can at this time confirm that it was of no consequence that the accused had given some evidence about an earlier contact with the complainant which also was in the form of contradictory evidence to that of the complainant. I do not feel that I was in any way influenced by his evidence on that point.

21 Immediately before the last quoted portion of his reasons, the trial judge had this to say:

> Having before me two witnesses who were of different opinions as to what occurred, I am unable to choose the evidence of one over the other and, therefore, as a trial judge I am directed to acquit the accused of the charge.

22 My reading of this, in the context of his reasons against the background of the evidence as a whole at the trial, is that the trial judge had a reasonable doubt as to the credibility of the complainant on the issue of non-consent, and as to her evidence more generally regarding what occurred in August 1993, as charged. That being so it was his duty to find the respondent accused not guilty, which he did.

23 In reaching this view of the matter, I have not ignored that portion of the trial judge's reasons where he said:

> There are, however, only two persons that were present and the stories and explanation given by them is conflicting. Without some additional evidence or circumstances that would cause the Court to be able to choose between witnesses under oath, a benefit goes to the accused.

24 The trial judge did not say that the evidence of the complainant required to be corroborated, as a matter of law, as may once have been the case in the prosecution of a sexual offence. What he did say was that there was nothing before him which removed his reasonable doubt as to the credibility of the complainant. It is true that he might have mentioned her demeanour, or that of the respondent accused, as observed by him when they testified at the trial; but he chose not to do so. Undoubtedly, as trial judges generally do, he took note of this aspect of the evidence and considered it in making his findings of credibility. As to the complainant's sprained (or strained?) wrist, this item of circumstantial evidence evidently weighed very little, if at all, with the trial judge, given the somewhat tenuous link between it and the alleged sexual assault. And as for the respondent's letter to the complainant, it is clear that it was no more deserving of weight than was the sprained wrist.

2. The onus and standard of proof

25 In the first part of the trial, Crown counsel (not counsel on this appeal) raised repeated objections to defence testimony which she chose to characterise as "hearsay", though it was made clear by counsel for the respondent accused that this testimony was not adduced for the truth of what was testified as having been said by the complainant or by the third party through whom she and the respondent communicated after their separation in February 1993. In making these objections, Crown counsel

demonstrated a failure to comprehend both the hearsay rule and the nature of the defence case as it was being presented to the trial judge during the trial. There being an issue as to consent, and potentially as to mistaken belief in consent, the manner in which this married couple communicated with each other was evidently at least of as much importance as the incidental truth or otherwise of the contents of their communications. In any event, these repeated objections may have obscured the reliance of counsel for the respondent accused upon the issue of "reasonable steps" as provided for in s.273.2(b) of the **Criminal Code**.

26 Since the case was decided on the issue of credibility, s.273.2 required no consideration by the trial judge, unless perhaps in reference to s.276 of the Code. It need only be said that what I have mentioned in respect of the relationship between s.273.1 and s.276 of the Code applies equally in respect of the relationship between s.273.2 and s.276.

27 The trial judge cited a number of judicial decisions for the proposition that he was not required to determine if the accused's explanation was true but only whether it might reasonably be true. And he cited additional authority for the further proposition that even where the defence evidence is rejected in its entirety the trial judge cannot find the accused guilty if there is still a reasonable doubt, on the whole of the evidence, as to his or her guilt. In other words, the accused person has no obligation in law to prove anything, he or she is presumed to be innocent and cannot properly be found guilty if, at the end of the day, the Crown has not proved its case against the accused, on the whole of the evidence, beyond a reasonable doubt.

The trial judge had no need to go on to consider whether the accused's explanation might reasonably be true if he remained unsatisfied, as he evidently was, that the complainant's evidence was credible. The trial judge's inability to determine who was telling the truth, as between the complainant and the accused, after having carefully reviewed and weighed the whole of the evidence, clearly left him with a reasonable doubt as to the accused's guilt, of which the benefit had to be given to the accused: **R. v. W.(D.)**, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 697, 3 C.R. (4th) 302; and see **R. v. L. (D.O.)** (1993), 85 C.C.C. (3d) 289, 25 C.R. (4th) 285 (S.C.C.).

3. Conclusion

29 This ground of appeal therefore fails also.

III. Disposition

30 The appeal is dismissed. Costs may be spoken to.

M.M. de Weerdt
J.S.C.

Yellowknife, Northwest Territories
May 20th, 1994

Counsel for the Appellant: Ms. Louise Charbonneau

Counsel for the Respondent: John U. Bayly, Q.C.

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