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SC 3046

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

B E T W E E N :

HER MAJESTY THE QUEEN

- and -

ISAAC OQUATAQ

Heard at Yellowknife, N.W.T., 23 January 1985.

Judgment filed: 7 February 1985.

Reasons for Judgment of
The Honourable Mr. Justice T. David Marshall

Counsel for the Crown:

N. Sharkey, Esq.

Counsel for the Defendant:

C. Rogers, Esq.

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REASONS FOR JUDGMENT

Herein are the reasons for judgment in a "hearing" held in accordance with s. 246.6(1)(a) [en. 1980-81-82-83, c. 125, s. 19] of the *Criminal Code*, R.S.C. 1970, c. C-34, concerning (in a case of alleged sexual assault) the admissibility of evidence of sexual activity of the complainant with persons other than the accused. The relevant sections (s. 246.6 and s. 246.7) read as follows, and I quote them in total for reference in this judgment:

> 246.6(1) In proceedings in respect of an offence under section 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless
> (a) it is evidence that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution;

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(b) it is evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant on the occasion set out in the charge; or
(c) it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject-matter of the charge, where that evidence relates to the consent that the accused alleges he believed was given by the complainant.

(2) No evidence is admissible under paragraph (1) (c) unless
(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to adduce the evidence together with particulars of the evidence sought to be adduced; and
(b) a copy of the notice has been filed with the clerk of the court.

(3) No evidence is admissible under subsection (1) unless the judge, magistrate or justice, after holding a hearing in which the jury and the members of the public are excluded and in which the complainant is not a compellable witness, is satisfied that the requirements of this section are met.

(4) The notice given under subsection (2) and the evidence taken, the information given or the representations made at a hearing referred to in subsection (3) shall not be published in any newspaper or broadcast.

(5) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (4) is guilty of an offence punishable on summary conviction.

(6) In this section, "newspaper" has the same meaning as in section 261.

246.7 In proceedings in respect of any offence under section 246.1, 246.2 or 246.3, evidence of sexual reputation, whether general or specific, is not admissible for the purpose of challenging or supporting the credibility of the complainant.

These sections, as I interpret them, envisage a *voir dire*, here called a "hearing" *in camera* in the absence of the jury,

and in which the complainant--it should be noted--is not a compellable witness. This matter came up in the course of a jury trial and at the end of the "hearing," having heard evidence adduced on behalf of the accused and argument on both sides, I have decided that the evidence of the complainant's intercourse with another, sought to be put to the jury, should not be admitted in this trial. I am of the view that the issue is one of importance--and certainly it is one of great complexity--so that I felt compelled to give written reasons, as best I can, for the decision that I have come to.

Counsel, though he gave the notice requisite under s-s. (2) of s. 246.6, conceded that he based his argument under s. 246.6(1)(a) rather than s-s.(c) that requires it. In the course of argument, an important question on the constitutionality of the limits established under s. 246.6 was raised. More specifically, that the limitations might offend ss. 7 and 11(d) of the Charter--so that I have considered those arguments as well in reaching my conclusion.

The development of the law on this question is a matter of some complexity and subtlety. It illustrates quite clearly the impact of popular values on both adjectival law and in effect on substantive law. Logic itself may be moved by strident values, and in the evolution of these rules marked changes took place as our values changed, from a strict Victorian to a very modern and liberal view of human sexuality.

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John Wigmore, the doyen of American evidence, has said of this question: "No question of evidence has been more controverted."[1] One thus, of necessity, enters into the analysis with a measure of humility.

In Canada, ss. 246.6 and 246.7 represent recent legislative changes, even further legislative changes, from the prior enactment, s. 142, which as well represented a departure from the common law on this question of evidence of sexual acts with someone other than the accused. Such exclusionary rules are known euphemistically as "rape shield" sections and since the 1970's have become prevalent in the common law world, especially the U.S.A. That term seems, to this Canadian, both pretentious and pejorative; I will call them simply protective sections or enactments.

In any event, their purpose, I think it is fair to say, is twofold: <u>first</u>, to protect a complainant against being humiliated by having her private sexual proclivities exposed to the public in the course of a trial; and <u>secondly</u>, and perhaps of greater social thrust, is the function of these protective sections in making the trial less onerous for the complainant, so that she and other victims are encouraged-- rather than discouraged from pursuing their rights and protections under our law.

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1 Wigmore, J., *Evidence in Trials at Common Law*, Vol. 1A (1983), p. 1313.

Those, I think, were the chief motives for the legislation, limiting a common law right generally to explore these often highly-prejudicial matters.

The Common Law and Legislative Changes

In essence, at common law, on a charge of rape a complainant could be asked about her prior sexual conduct, and her reputation for chastity was relevant and admissible. She could be asked about prior sexual connections with other men, but she was not obliged to answer--the judge was to decide if she must answer or not. If she denied them, then that was the end of the matter.[2] So admissibility depended on relevance, either to a material issue such as consent or penetration, or to a collateral issue, for example, credibility.

These rules were worked out over many years and were generally accepted, it seems, for a long time.[3]

These limits were applied and the courts reasoned cogently, on the matter of collateral evidence, that if one charge might be made against the prosecutrix fifty might be made, so that

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2 See *R. v. Krausz* (1973), 57 Cr.App.R. 466; *Laliberte v. The Queen* (1877), 1 S.C.R. 117; *R. v. Finnessey* (1906), 11 O.L.R. 338; *R. v. Moulton*, [1980] 13 C.R. (3d) 143 (Alta. C.A.); *R. v. Konkin*, [1983] 3 C.C.C. (3d) 289 (Wilson J.); see also Cross, *On Evidence*, 4th ed., Butterworths, p. 233; also McWilliams, P.K., *Canadian Criminal Evidence*, 2nd ed., p. 301.

3 The authorities in footnote 2 bear this out.

it would involve a multitude of collateral issues, without notice, for which she would be wholly unprepared; and so they held that the answer, once given, must be binding.[4] With the vision of hindsight, we can now say that common law rule had much to recommend it.

There was as well at common law no specific requirement for corroboration in these cases.[5] Interestingly, this was the first feature to be altered by statute, and at that point clearly the tide of opinion was running in the opposite direction--to the normative views that prompted the later sections that we find today and which I have quoted (s. 246.6). At that earlier time, the great fear was the ease with which an innocent man might wrongly be convicted of rape--that, needless to say, was the Victorian era.[6]

And so in Canada, the first enactment (s. 142) of the *Criminal Code* required that a corroboration warning be given in these cases. Both Glanville Williams and John Wigmore feared unfounded rape charges for various psychological aberrations in complainants--emotional, instinctive, social, and "other derangements." Their rhetoric to us now seems odd.[7]

But other psychiatric luminaries like Karl Menninger and Helene Deutsche joined in these views, and they were widely

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4 See *Laliberte v. The Queen, supra.*

5 See footnote 4 also.

6 See *R. v. Henry and Manning* (1968), 53 Cr.AppR. 150 at 153 (per Salmon L.J.).

7 See Sullivan, L.T.K., *The Anatomy of Rape*, 40 Sask. L.R. (1975-76) 25.

held, leading apparently to legislation in many jurisdictions similar to our original s. 142.[8] The belief was put simply by a United States assemblyman who laconically said: "The difference between rape and romance is a very thin line and we have to be careful."[9]

In the mid-20th century these views were discarded. Women's rights, the equality of women, and their just treatment by society in general and the law in particular, became a powerful force for change. There was a new attitude toward sex, and women's equal rights in that matter as well. If men could choose unchastity without social redress, why not women--and so the pendulum swung, indeed flew, in the other direction.

A great number of learned articles appeared pointing out the problems of the questioning of the complainant about other sexual contact in a rape trial. They were critical.[10] Parliament responded to this change in values and thinking in 1976 with a new s. 142, which I now quote:

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8 See Brooks, N., *Rape and the Laws of Evidence*, Chitty's Law Journal, Vol. 23, No. 1, 1975, p. 1, therein J. Wigmore is quoted: "No judge should ever let a sex charge go to the jury unless the female complainant's social history and mental makeup have been examined and testified to by a qualified practitioner."

9 *Ibid.*, p. 27.

10 See articles listed in *R. v. Moulton*, [1980] 13 C.R. (3d) 143 (Alta. C.A.) at 162.

142.(1) Where an accused is charged with an offence under section 144 or 145 or subsection 146(1) or 149(1), no question shall be asked by or on behalf of the accused as to the sexual conduct of the complainant with a person other than the accused unless

(a) reasonable notice in writing has been given to the prosecutor by or on behalf of the accused of his intention to ask such question together with particulars of the evidence sought to be adduced by such question and a copy of such notice has been filed with the clerk of the court; and

(b) the judge, magistrate or justice after holding a hearing <u>in camera</u> in the absence of the jury, if any, is satisfied that the weight of the evidence is such that to exclude it would prevent the making of a just determination of an issue of fact in the proceedings, including the credibility of the complainant.

(2) The notice given under paragraph (1)(a) and the evidence taken, the information given or the representations made at a hearing referred to in paragraph (1)(b) shall not be published in any newspaper or broadcast.

(3) Every one who, without lawful excuse the proof of which lies upon him, contravenes subsection (2) is guilty of an offence punishable on summary conviction.

(4) In this section, "newspaper" has the same meaning as it has in section 261.

(5) In this section and section 442, "complainant" means the person against whom it is alleged that the offence was committed.

This section was to better the complainant's situation in a rape trial, and indeed it did at least provide for an *in camera* hearing; it also abolished the compulsory warning in regard to corroboration of a complainant's testimony. But there were problems.

The Supreme Court of Canada dealt with s. 142 in the case of *Forsythe v. The Queen*, [1980] 53 C.C.C. (2d) 225, 112 D.L.R. (3d) 385, 2 S.C.R. 268. The Court in that case held that the purpose of the section was to "balance the interests" of both the complainant and the accused.[11] Then, in a further case, the Supreme Court went on to hold that this new balance dictated that the complainant was generally a compellable witness at the *in camera* hearing.[12]

Then, over all, it became clear, as one of the Supreme Court Justices put it in the *Konkin* case, that ". . . s. 142, instead of minimizing the embarrassment to the complainants, [has] increased it." (per Madam Justice Wilson),[13] and the Uniform Law Conference of Canada, in their *Report on Uniform Rules of Evidence* (Carswell, Toronto, 1982), stated, ". . . the effect (of s. 142(1)(b)) seems to have cut down the rights of the rape victim contrary to Parliament's intention." No longer could she refuse to answer, no longer was her answer on specific acts a collateral matter, so she could now be contradicted. Credibility, once collateral, had been turned into a material issue,[14] to the detriment of the complainant.

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11 See *Forsythe v. The Queen*, *supra*, C.C.C. at 232, D.L.R. at 392, S.C.R. at 276.

12 See *R. v. Konkin*, [1983] 3 C.C.C. (3d) 284.

13 *Ibid.*, p. 289.

14 See *Report on Uniform Rules of Evidence*, p. 72.

So all in all, s. 142, it seemed, had failed to achieve in great part, its purposes. The section itself had taken a discretionary approach, that is, giving the judge a discretion to keep out the evidence; but in the result, for reasons of drafting or interpretation, or perhaps the complexity of the problem, it had failed.

The Americans by this time had had a good deal of experience in these matters and many states had passed protective sections of various types.[15] In Canada, the *Report on Uniform Rules of Evidence*, in response, now suggested a new approach, a comprehensive exclusionary rule abolishing the common law rules and specifically identifying the evidence that is to be admissible and excluding all other. A majority of the task force members concluded that this was the better approach. They also recommended abolishing both notice and the concept of an *in camera* hearing. It is noteworthy there was little concord amongst the task force members.[16]

Our Parliament next provided the present s. 246.6 and s. 246.7 in January 1983, both of which are quoted above.

These new sections, though they follow the majority view of the task force in great part, do not eliminate the *in camera* hearing and the victim is not a compellable witness at

15 See generally, Wigmore, *op. cit.*

16 See *Report* (footnote 14), p. 73.

the hearing. It is to be noted that three categories only are set up, and evidence--and only evidence--fitting into these categories is now admissible.

In the analytic sense, one could summarize these legislative attempts to solve this problem in this way. At common law admissibility depended on whether the evidence was relevant to a material issue like consent, or to a collateral issue, i.e., credibility. General reputation was admissible; this was thought then to be relevant to the material issue of consent.

Section 142 made the evidence relevant and material, if the judge so decided, that is, in both the cases of material and collateral evidence. So, credibility was treated as material and open to exploration. Now ss. 246.6 and 246.7 make this evidence admissible, only if it fits one of the listed categories. Reputation evidence does not fit under s. 246.6, it seems, and it is doubly denied admissibility under s. 246.7 in regard to credibility.

These sections have not long been in effect and consequently there is not as yet much guidance from the cases. In fact, the only case cited to me was that of *R. v. Bird and Peebles* (1984), 40 C.R. (3d) 41 (Man. Q.B.), a case where, as here, it was argued that the new sections (ss. 246.6 and 246.7) offend the Charter (specifically ss. 7 and 11(d)). It was contended that the accused was precluded from making a full

answer and defence on the issue of consent and honest belief in consent by reason of the restrictions and limitations contained in ss. 246.6 and 246.7.

The *Bird and Peebles* case I think merits close scrutiny. The facts in that case are that Bird and Peebles were accused of sexual assault. The evidence sought to be adduced under the statute was that the complainant in the case, it was alleged, routinely went to parties, became grossly intoxicated, and commonly had sexual relations with men who were present. She had a reputation for that type of conduct, and it occurred on many occasions. Further, the accused were aware of this reputation and behaviour. Approximately one week prior to the event giving rise to the charge, the two accused were present when the complainant had sexual relations with 5 men.[17]

Now it was argued *inter alia* that this evidence was relevant to the issue of consent. It was further argued that this evidence would be excluded by the new *Criminal Code* provisions, and that this constituted a limitation or restriction upon the evidence and denied the accused the right to make a full answer and defence--thereby denying them the right to a fair trial as expressly provided in the Charter.[18]

The Court considered these arguments and found that the limitations were evidentiary in character and concluded: "They

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17 See *R. v. Bird and Peebles*, [1984] 40 C.R. (3d) 41.

18 *Ibid.*, p. 46.

do not abridge or abrogate a defence." The evidence was thus not admitted.

The Court reviewed a number of authorities and concluded that the American legislation was generally in accord with the Canadian statute. The learned judge concluded that the American experience was of assistance.[19]

However, with respect, that question remains moot in the United States, because I note in the 1983 edition of Wigmore's treatise on evidence the learned author states, and I quote:

> A cursory inspection of the rape shield laws . . . suggests that the legislative bodies responsible for the enactment of those laws failed to appreciate the complexity of the problems confronting them. The result, considered as a whole, is a set of remarkably ill-drafted and ambiguous statutes. . . . Courts will have to use considerable ingenuity to construe these badly drafted statutes.[20]

In regard to s. 246.7, the Court, in the *Bird and Peebles* case, concludes that the probative value of such evidence would generally be outweighed by the prejudicial effect. This, I think, broadly considered, implies that some cases will fall outside the general and in those cases very probative evidence will be excluded, to the great hazard of the accused.

The legislative framework in England was referred to in *Bird and Peebles* as well. In England, the Court noted, however,

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19 *Ibid.*, p. 49.

20 Wigmore, *op. cit.*, p. 1298.

that similar provisions allow that "with the leave of the judge, evidence and cross-examination about the complainant's other sexual experience is allowed, provided the judge is satisfied that it is so relevant that it would be unfair to the defendant to exclude it."[21] --a discretionary approach, and quite different from our s. 246.6 and s. 246.7.

The case of *Bird and Peebles* concludes that the impugned legislation does not offend the Charter and that it is demonstrably justified in a free and democratic society, and that it is consistent with the patterns of legislation in other free and democratic societies.

Counsel for the Crown contends that that case, as of now, states the law. With great respect, and conceding that the Court in that case quite nobly attempted to maintain the integrity and purpose of the enactment, I cannot agree.[22]

The question of the proper evaluation of such evidence is a difficult one. It is a question of logic--what is relevant, what is logically probative of the issues with which we are dealing. The question reaches to the heart of judicial reasoning.

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21 See *Bird and Peebles*, *supra*, p. 54.

22 See *R. v. Bird and Peebles* (1984), 12 C.C.C. (3d) at 523, where an appeal was decided on another point.

The lynch pin of the enigma, in my view, is this. Is the willingness to have intercourse outside of marriage or established relationships any indication of a willingness to consent to intercourse with someone else? Put another way, in the terms of the Task Force Report (p. 66), is evidence that the complainant "is in the habit of submitting her body to different men, without discrimination, whether for pay or not, logically probative of what she did at the time in question?"[23] The Task Force concluded that such belief, if accepted, is based on a moral judgment that such a woman would be more likely to have consented.

Well, the Task Force Report clearly disavows this belief in its recommendations, and they would deny admission of evidence of unchastity, <u>except</u> in cases of prostitution; or if the accused knew about the evidence (i.e., when the alleged crime took place), because the accused might then have honestly believed the complainant was consenting.[24] This was perhaps more cogent than the section finally enacted, but it still denied the hypothesis that perhaps marked levels of unchastity--still short of prostitution--should be admissible as logically probative of consent or honest belief in consent.

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23 See Task Force Report, *supra*, p. 66, citing *R. v. Krausz* (1973), 57 Cr.App.R. 466.

24 See *R. v. Pappajohn* (1980), 52 C.C.C. (2d) 481.

There are great problems with this. A statement in the Task Force Report, I think, makes this clear when, after having concluded that unchastity was not logically probative of consent, they said (at p. 74): "The majority of the Task Force is of the view . . . that a prostitute is generally more willing to consent to sexual intercourse and is less credible as a witness because of that mode of life." (emphasis added) Surely, there is a problem here in logic.

But the basic fact is that what we are seeking, it seems to me, is judicial truth.

The test for judicial truth--the best we have devised, far better than the oath or the ordeal--is a full defence and full hearing of evidence, with an impartial fact-finder testing the evidence for its harmony, or lack of harmony, with the preponderance of possibilities disclosed by the facts and circumstances in the conditions of a particular case.[25] This test, like the others, is far from infallible. We look at the preponderance of possibilities and for harmony, that is, probability. This, I think, is where the new rules based on values collide, as it were, with judicial logic or decision-making itself.

Now, then, in logic, is sexual indulgence outside of marriage

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25 See *R. v. Pressley* (1948), 94 C.C.C. 29 (B.C. C.A.) at 34.

or established relationships (one could perhaps still call it unchastity) logically probative of consent on a particular occasion? Does it make consent more harmonious with all the circumstances, and does it move the trier toward one preponderance of possibilities? Does it mean the girl was more likely to have consented?

Or it could be put simply this way. Is the girl who indulges herself sexually outside of marriage or established relationships more likely to consent? The antithesis would be: Is a girl who <u>does not</u> indulge herself outside of marriage or established relationships ever, as likely to have consented? Applying the test we use to establish judicial truth, I think the answer can only be <u>No</u>. The antithesis is also logically probative, I think--though not conclusive, of course, but logically probative.

The problem is that this assumption or probability, if you like, that a woman would on this occasion have consented, because she is sexually more active, denies both autonomy and dignity to women. This is repulsive to a society attempting to rectify a long-standing inequality of women.

The courts have thus, I think, been reluctant to forsake the analytic approach for the normative, even though recognizing that the new attitudes and values are worthy.[26]

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26 See *R. v. Konkin* and *R. v. Moulton* under footnote 2.

What offends one's sense of justice most, I think, is that relating unchastity to a likelihood of consent is unfair and also, of course, not conclusive in any individual case. What one must realize, though, is that our test for judicial truth is based on probabilities. This is, of course, both fallible and flawed. It may also show, in a specific case, rank prejudice; but we use it.

A useful analogy can be drawn, I think, from the cases where self-defence and a propensity for violence on the part of the victim are raised. In those cases, evidence of the victim's character for violence is admissible to show the probability of the victim having been the aggressor and to support the accused's evidence that he was attacked by the victim.[27]

In the case of *Scopelliti*, the Ontario Court said of this issue, in regard to its comparison with similar fact evidence, at p. 538:

> . . . Thus, the admission of similar fact evidence against an accused is exceptional, being allowed only if it has substantial probative value on some issue, otherwise than as proof of propensity (unless the propensity is so highly distinctive or unique as to constitute a signature). No such policy rule operates to exclude evidence of propensity with respect to a person other than the accused where that

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27 See *R.* v. *Scopelliti* (1981), 34 O.R. (2d) 524; *R.* v. *Dubois* (1976), 30 C.C.C. (2d) 412; see also Wigmore, *op. cit.*, p. 1312.

> person's propensity to act in a particular way is relevant to an issue in the case.

The Court went on to say, at p. 539, that such evidence may be prejudicial and "arouse feelings of hostility," so there must be "some element of discretion" in the judge to determine if "the proffered evidence has sufficient probative value for the purpose for which it is tendered to justify its admission."

One might also compare the statutory enactment or the legislation creating as a rule of evidence a quasi privilege to protect the victim. But the common law has been loathe to create new privileges of any kind[28] because of the injustices that logically follow, and indeed such privileges as it has allowed fall when, as here, the evidence is required to make out the innocence of an accused person.[29]

This brings me then to the argument that the impugned sections offend the Charter. Sections 7 and 11(d) of the Charter read as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right . . .
> (d) to be presumed innocent until proven guilty

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28 Doctors and social workers, to name but two.

29 See *R. v. Dunbar and Logan* (1982), 28 C.R. (3d) 324; *R. v. Barton*, [1973] 1 W.L.R. 115, [1972] 2 All E.R. 1192 (Crown Ct.)

according to law in a fair and public hearing by an independent and impartial tribunal; . . .

Section 52(1) of the *Constitution Act* [en. by the *Canada Act*, 1982 (U.K.), c. 11, Schedule B] states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect."

Having reviewed the decision in *Bird and Peebles* and the arguments made, and having considered the matter to the best of my ability, I am of the opinion that ss. 246.6 and 246.7 do offend the Charter.[30]

The Charter is the supreme law of our country. The Constitution represents the public's limitation on the powers of the legislatures--in this case to truncate or curtail the right of the individual to a fair trial. The courts are the guardians of those rights.[31]

A constitutional right to a fair trial, as is guaranteed by s. 11(d) of our Charter, should be given, in my view, the broadest possible interpretation as regards matters touching liberty.[32]

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30 See the useful article by David Doherty, "*Sparing*" *the Complainant* "*Spoils*" *the Trial*, 40 C.R. (3d) at 55.

31 See s. 24(1), *Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982.

32 See *Minister of Home Affairs v. Fisher*, [1979] 3 All E.R. 21 (P.C.), per Lord Wilberforce at p. 25, quoted in Tarnopolsky and Beaudoin, *The Charter of Rights and Freedoms, Commentary* (1982, Carswell) at p. 77.

In Professor John Willis' words on general statutory interpretation, "Personal liberty is no mean part of our common law heritage, and . . . in ordinary cases the presumption always has been, and still is, a sound canon of legislative intent . . ."[33]

Under ss. 246.6 and 246.7, the limitations imposed in making a full defence do, in my opinion, operate unfairly against the accused. The right to full answer and defence requires the right to a full examination of one's accuser.[34] Mr. Justice Laskin, in *Forsythe v. The Queen*, in the course of his reasons, put this matter thus: "Of course, the accused must not be prevented from making full answer and defence.[35]

Having said that, I am of the view that the Court must give a liberal reading to the sections, and, applying s. 52(1) as quoted above, the Court must needs retain a discretion to assess the proferred evidence for probative value and prejudicial effect. The Court must as well be very careful to follow the clear statutory injunction, and weigh heavily and carefully the prejudicial side of the balance--yet taking care that, on the whole of it, the accused is assured a fair trial, as is his right.

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33 See Tarnopolsky and Beaudoin, *supra*, at p. 32; see also Lord Sankey in *Edwards v. A.G. of Canada*, [1930] A.C. 124 at 136 (P.C.).

34 See *R. v. Sawchyn* (1981), 124 D.L.R. (3d) 600, 22 C.R. (3d) 34; *R. v. Konkin*, note 2, at p. 201; *Laliberte v. R.*, *supra;* see also Wigmore, *op. cit.*, p. 1310.

35 See *Forsythe v. The Queen*, *supra*, per Laskin C.J.C.

In the case at bar, evidence from the transcript of the Preliminary Hearing only was presented. In essence, this evidence was that after the alleged assault the complainant returned to her residence, where on the same night she then had intercourse with a second man.

The contention of counsel for the accused was that the bruising, that was present approximately one day later, may well have come from this second intercourse. The bruising was quite evident and extensive in photographs that were admitted in evidence. However, as well, in the transcript the complainant had been asked directly if there had been any cause for bruising from this second episode, and she had replied that there had not.

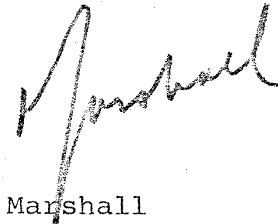
That, in essence, was the evidence sought to be adduced before the jury.

Now, applying the tests that I have outlined to these facts, I have concluded that this evidence of intercourse after the alleged assault is of little relevance--in the sense of being logically probative on any issue in this trial. On the other hand, its prejudicial effect in this trial, in my view with a jury, would be great. And so, in regard to the discretion that I have, I am of the opinion that the evidence should not go before the jury.

In regard to counsel's argument, that the evidence of the second intercourse tends to rebut evidence of the Crown as to

bruising of the complainant, that was said to have occurred during the sexual assault, it is noted, and I repeat, that on the preliminary hearing the complainant emphatically denied any bruising from that intercourse. The result is that I hold that the evidence fails on this second ground to come up to the requirement of rebuttal evidence, under s. 246.6(1)(a), and for this reason as well should not be put before the jury.

For all these reasons, the motion to produce the evidence of the second intercourse to the jury, under s. 246.6 of the *Criminal Code*, is denied.



T. David Marshall
J.S.C.

Yellowknife, N.W.T.,
5 February 1985.

Counsel for the Crown : N. Sharkey, Esq.

Counsel for the Defendant: C. Rogers, Esq.

SC 3046

IN THE SUPREME COURT OF THE
NORTHWEST TERRITORIES

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- and -

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REASONS FOR JUDGMENT OF THE
HONOURABLE MR. JUSTICE T. DAVID MARSHALL