

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

JEREMY FRANCIS DANIELS

OCT 3 1998

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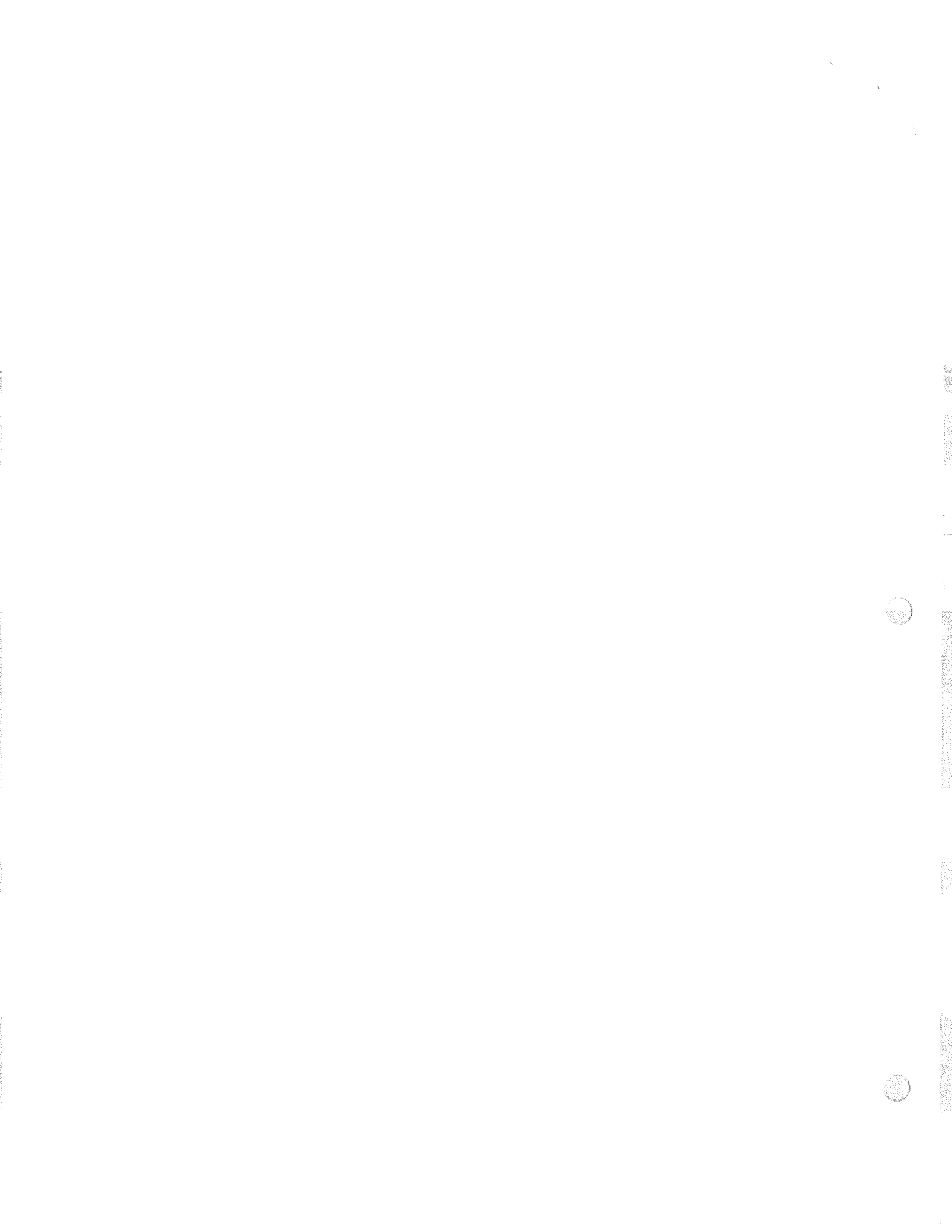
Transcript of the Ruling by The Honourable Justice J.Z. Vertes  
on an Application by the Accused under Section 276 of the  
Criminal Code, at Yellowknife in the Northwest Territories,  
on Monday, October 5th A.D., 1998.

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**APPEARANCES:**

Mr. B. Allison:	Counsel for the Crown
Ms. S. Kay:	Counsel for the Accused

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Charge under s. 271 Criminal Code of Canada



1 THE COURT: The defence has brought a motion  
2 seeking to admit evidence as to sexual activity between  
3 the complainant and the accused on occasions other than  
4 the offence in question. The accused is charged with a  
5 sexual assault allegedly committed on May 10th, 1997.

6 The Crown conceded that the preliminary threshold  
7 set by Section 276.1(4) of the Criminal Code has been  
8 met. On the hearing of this motion, the accused  
9 testified. In addition, the defence Notice of Motion  
10 made reference to the preliminary inquiry evidence of  
11 the complainant so I have reviewed a transcript of that  
12 evidence.

13 The accused testified that, in addition to the May  
14 10th encounter, which he says was consensual, there  
15 were two other sexual encounters between him and the  
16 complainant. The first was approximately one week prior  
17 to May 10th when the accused and the complainant  
18 engaged in consensual intercourse. Apparently there is  
19 some evidence to corroborate or support the fact that  
20 there was some sort of encounter between the two of  
21 them at the time. The accused also testified to an  
22 encounter approximately one month after May 10th when  
23 the complainant told him that she wanted to withdraw  
24 the charge but was afraid to do so and then invited the  
25 accused back to the same residence where the previous  
26 encounters took place. He claims that they engaged in  
27 consensual intercourse at that time. No one knows what

1 the complainant may say if confronted by this  
2 evidence.

3 The defence position is that the complainant is  
4 fabricating the allegation of non-consent on May 10th.  
5 The fabrication may be due to fear or pressure from the  
6 person who is the owner of the residence where the  
7 complainant was living. The accused says that the  
8 sexual encounter of May 10th was consensual and that  
9 evidence of these other encounters, especially the last  
10 one, would enable the jury to properly assess the  
11 complainant's credibility.

12 The preliminary inquiry transcript shows that the  
13 complainant acknowledged that, with respect to the  
14 alleged offence, it was, and I quote, "okay" for the  
15 accused to be kissing her. This was after she said she  
16 had no recollection how she got home or how the accused  
17 got in her bedroom. She also ran away when the police  
18 were called by the owner of the residence.

19 Section 276 of the Criminal Code prohibits the  
20 admission of evidence as to the complainant's sexual  
21 activity other than the subject-matter of the charge.  
22 The prohibition is aimed at the use of such evidence to  
23 support what have been termed the "twin myths", that is  
24 to say, that an unchaste woman is more likely to  
25 consent to sexual activity and is less worthy of  
26 belief. It is that fallacious reasoning that is the  
27 object of the exclusion. The use of such evidence for

1 any other purpose must be assessed on the basis of its  
2 relevance and its probative value contrasted with its  
3 prejudicial effect.

4 In this case the evidence is not offered so as to  
5 raise one of the prohibited inferences. It is directed  
6 to the issue of the complainant's credibility as to her  
7 consent in a specific instance, not in some general  
8 sense.

9 In my opinion, Section 276 does not prohibit all  
10 inferences leading from evidence to conclusions about  
11 consent or believability. Evidence is excluded  
12 automatically only where it is used solely to support  
13 the inference that the complainant, by reason of the  
14 sexual conduct, is more likely to have consented or is  
15 less worthy of belief. It is therefore wrong to say  
16 that evidence of other sexual activity will never be  
17 admitted on the issues of consent and credibility. It  
18 all depends on the use that is to be made of such  
19 evidence.

20 The evidence as to the contact by the complainant  
21 with the accused both before and after the alleged  
22 offence does not, in my opinion, trigger the prohibited  
23 general inferences. It is not necessary, nor is it  
24 inevitable, for the jury to resort to either of the  
25 rape myth propositions so as to make the evidence  
26 useful.

27 The complainant alleged, at the preliminary

1 inquiry, that she did not know how the accused got into  
2 her bedroom, that he was trying to force her into sex,  
3 but that kissing her was "okay", and that she ran away  
4 when the police were called. Standing on its own in  
5 isolation, this evidence may lead a jury to conclude  
6 that the accused was simply an intruder or perhaps  
7 something more if, as the complainant said, the kissing  
8 was "okay". Either way, it gives an incomplete picture.

9 The evidence of the prior encounter may help  
10 explain the accused's presence that night. The evidence  
11 of the subsequent encounter may cast light on the  
12 complainant's credibility as to the alleged offence.

13 With respect to the evidence of alleged sexual  
14 activity both before and after the alleged offence, the  
15 question is not was she more likely to have consented  
16 because of the other sexual activity. The question is  
17 whether she is less credible as to her evidence of  
18 non-consent on this specific occasion given the  
19 evidence of consensual activity both before and after  
20 the alleged nonconsensual act. This calls for a  
21 specific inference from specific facts on the only live  
22 issue in this case. The probative value of this  
23 evidence does not depend on the rape myths indentified  
24 in the jurisprudence. It is, in my opinion, necessary  
25 to put this evidence before the jury so that they will  
26 have a total picture and so as to enable the accused to  
27 make full answer and defence.

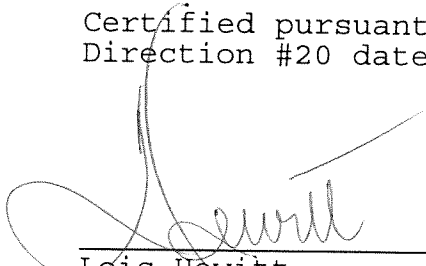
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It is also for this reason that giving only part of the evidence as to the other encounters - leaving out the sexual aspect as Crown counsel suggested - would not give a complete picture as to the relationship, albeit not a continuing one, between these two people.

In my opinion the proposed evidence is relevant and highly probative of the issue of credibility. The probative value of the evidence does not depend upon resort to the twin myths noted previously but in its ability to put the events of May 10th into a context and to assess the complainant's credibility specifically as to her allegation of non-consent on that occasion. A warning to the jury that this evidence can only be used to assess the complainant's credibility in relation to the specific events forming the subject-matter of the charge, and not to draw the prohibited general inferences, should overcome any possible prejudice resulting from the admission of this evidence.

The evidence is therefore admissible.

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Certified pursuant to Practice Direction #20 dated December 28, 1987.  
  
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Lois Hewitt,  
Court Reporter

