

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

KENNETH TAZZI

Applicant

Pre-trial application pursuant to s.276.1 of the *Criminal Code*.

Heard at Yellowknife, NT: June 12-13, 2000

Reasons for Decision filed: June 15, 2000

REASONS FOR DECISION OF THE HONOURABLE MR. JUSTICE R.S. VEALE

Counsel for the Respondent: Sue Kendall

Counsel for the Applicant: Peter Fuglsang

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REASONS FOR DECISION

Pursuant to Section 276.2(3) of the *Criminal Code*

[1] The accused, Kenneth Tazzi, has been charged with committing a sexual assault on the complainant and uttering a threat to the complainant to cause death or bodily harm.

[2] This is a pre-trial application by Defence counsel for Kenneth Tazzi under s.276.1 of the *Criminal Code* seeking to cross-examine the complainant about her previous sexual activity with Kenneth Tazzi. He also applies to allow Kenneth Tazzi to testify about their previous sexual activity, should Kenneth Tazzi give evidence.

[3] The following evidence has been filed:

1. affidavit of Kenneth Tazzi sworn June 2, 2000,
2. transcript of the Preliminary Inquiry held on December 3, 1999,

3. statement of the complainant to the RCMP taken October 5, 1999,
4. statement of the complainant to the RCMP dated October 6, 1999,
5. statement of the complainant to the RCMP dated June 2, 2000.

[4] The Crown did not object to the use of the statements of the complainant being considered for the application.

[5] Pursuant to s. 276.1, I am satisfied that Defence counsel has made an application in writing that complies with s.276.1(2)(a) and (b). The application sets out the particulars of the alleged sexual activity of Kenneth Tazzi and the complainant predating the charges and raises an issue of credibility of the complainant. The Crown has received a copy of the application and the affidavit of Kenneth Tazzi. Although it was not delivered until Friday, June 9, 2000, the Crown is not objecting to the notice, and I allow the short notice under s.276.1(4)(b).

[6] I am satisfied that the evidence of previous sexual activity of Kenneth Tazzi and the complainant is capable of being admissible under s.276(2). I, therefore, have allowed the application to proceed to a hearing under s.276.2 with the jury and the public excluded.

[7] The hearing under s.276.2 raises two issues:

1. Does s.276 apply only to consensual sexual activity and not to non-consensual sexual activity?
2. Should the evidence be allowed under s.276, or otherwise, for cross-examination of the complainant and for Kenneth Tazzi, in-chief, should he testify?

[8] The first issue is problematical in that the evidence of the complainant is that her previous sexual activity with Kenneth Tazzi was not consensual. However, Kenneth Tazzi, in his affidavit sworn June 2, 2000, implies that his previous sexual activity with the complainant was consensual. Counsel for Kenneth Tazzi submitted that it may not be necessary to invoke s.276 if the sexual activity was non-consensual. However, he brought the application out of caution as he wished to cross-examine on it and perhaps lead evidence on it.

[9] The Crown did not wish to cross-examine Kenneth Tazzi on his affidavit, and the complainant is not a compellable witness and was not called as a witness for the hearing.

I am, therefore, unable to make any finding on the issue of consensual or non-consensual previous sexual activity as I have had no opportunity to hear *viva voce* evidence. The complainant and the accused both state that previous sexual activity took place but they disagree on the issue of consent.

[10] The Courts of Appeal of Nova Scotia, Prince Edward Island, Ontario, Saskatchewan and British Columbia have concluded that s.276 does not apply to non-consensual activity.

[11] However, the Northwest Territories Court of Appeal has not decided the approach it will take to s.276 (see *R. v. Bell*, [1998] N.W.T.J. No.84 at para.33 (C.A.)). On account of the fact that it is not at all clear whether the previous sexual activity in this case is consensual or not, I will apply s.276 as it would be unfair to deny the complainant the protection of s.276 when the issue of consent is in doubt.

[12] I am also cognizant of the Ontario case of which applied the s.276(3) factors as part of the common law in circumstances where the previous sexual activity was non-consensual. See *R. v. Sakakeesic*, [1994] O.J. No.2021 (Ont.Ct.Gen.Div.).

[13] The fact that is not in dispute in this case is that the complainant did not disclose her previous sexual activity with the accused to the R.C.M.P. in her October 5 and 6, 1999 statements, nor to the court at the preliminary hearing on December 3, 1999. It was not until her statement of June 2, 2000 to the R.C.M.P. that she revealed her previous sexual activity with the accused. The Crown submitted that the evidence of the complainant in not revealing previous sexual activity was consistent with a person who did not consent to it. Defence counsel submitted that the complainant was completely inconsistent, if not misleading, in her October 1999 statements and preliminary hearing evidence in the light of her June 2, 2000 statement to the R.C.M.P.

[14] The evidence of the complainant prior to her statement of June 2, 2000, could be interpreted to suggest that her previous relationship or contact with the accused was platonic. This was clearly not the case.

[15] I find at the very least that a question of credibility is raised about the apparent inconsistencies in the evidence of the complainant. I will allow the complainant to be cross-examined on the inconsistencies in her evidence and statements about previous sexual activity with Kenneth Tazzi for those facts alleged in his affidavit sworn June 2, 2000. The jury will be warned as to the prohibited use of that evidence under s.276(1)

and the cross-examination should avoid extensive detail about the previous sexual activity which is not the subject matter of this trial.

[16] Although there is a danger of prejudice to the proper administration of justice, it is far outweighed by the fairness required to ensure the accused can make a full answer and defence.

[17] Defence counsel also raises the defence of honest but mistaken belief and in order to adduce the evidence that may support such a defence, the previous sexual activity can be raised in-chief by the accused if he testifies.

[18] I also find that the right of the accused to make a full answer and defence outweighs the risk that the evidence may unduly arouse sentiments of prejudice against the complainant.

R.S. Veale,
Deputy Judge

Dated at Yellowknife, NT,
this 15th day of June 2000

Counsel for the Respondent: Sue Kendall
Counsel for the Applicant: Peter Fuglsang

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