

R. v. Keevik, 2010 NWTSC 03

S-1-CR2009000033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

STANLEY KEEVIK

Transcript of the Ruling by the Honourable Justice J. E.

Richard, on an Application under Section 276 of the

Criminal Code, at Yellowknife in the Northwest

Territories, on January 4th, A.D., 2010.

APPEARANCES:

Ms. J. Walsh: Counsel for the Crown

Mr. H. Latimer: Counsel for the Accused

Charge under s. 271 Criminal Code of Canada

An order has been made banning publication of the identity
of the Complainant/Witness pursuant to Section 486.4 of
the Criminal Code of Canada

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1 THE COURT: On this application, the
2 accused seeks a ruling on the admissibility of
3 evidence that he wishes to adduce at his jury
4 trial - evidence of previous consensual sex
5 between he and the complainant.

6 At the trial the complainant is expected to
7 testify that on or about September 27th, 2008,
8 she was sexually assaulted by this accused who
9 was at the time an acquaintance or friend of
10 hers. At the trial the accused is expected to
11 raise the defence of consent to the sexual
12 assault.

13 On this application, the accused has
14 provided evidence of a statement made by the
15 complainant to the investigating RCMP officer two
16 days after the alleged assault. That evidence is
17 in the form of a transcript of her statement
18 which is in a question and answer format. After
19 a series of questions and answers about the
20 alleged incident, the police officer asked this
21 question:

22 Question: Had you and Stanley
23 ever been sexually involved before?

24 Answer: No.
25 On this application the accused gives
26 evidence, both in affidavit form and viva voce,
27 that he and the complainant had had consensual

Official Court Reporters 1

1 sex on a prior occasion, specifically in June or
2 July of 2008, at a specific motel room in
3 Yellowknife.

4 On this application, the accused seeks a
5 ruling of the Court under Section 276.2 that
6 would allow his counsel at trial to:

7 (a) ask the complainant in cross-examination
8 whether she had engaged in prior sexual activity
9 with the accused,

10 (b) adduce evidence of her statement to the
11 police when she denied prior sexual activity with
12 the accused,

13 (c) adduce evidence from the accused that
14 the accused and complainant had engaged in prior
15 sexual activity in June or July of 2008 in the
16 motel room.

17 Section 276.1 requires the accused to set
18 forth in his written application the relevance of

19 the proposed evidence to an issue at trial. The
20 grounds of relevance stated in this accused's
21 written application can be summarized as follows:

22 1. The evidence is necessary to show that
23 the complainant is careless with the truth and
24 thus it would be dangerous to believe her under
25 oath, and

26 2. The evidence is necessary to show the
27 true relationship between the parties as

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1 circumstantial evidence in the case.

2 I will deal with the second ground in the
3 accused's written application.

4 With due respect, this is simply a
5 disingenuous attempt to circumvent the statutory
6 law of evidence which states that evidence of
7 prior sexual activity is not admissible to
8 support an inference that the complainant is more
9 likely to have consented to the sexual activity
10 that forms the subject matter of the charge
11 before the jury. There is no merit in the
12 submission that the mere fact of a prior sexual
13 relationship between accused and complainant is

14 relevant to an issue at trial.

15 The other claimed ground of relevance is
16 more problematic.

17 The accused wishes to show that the
18 complainant lied to the police officer about
19 their prior sexual activity and hence is a
20 witness who ought not to be believed by the jury.
21 He submits that the proposed evidence is thus
22 relevant to an issue at trial and that issue is
23 the credibility of the complainant.

24 In order for the jury to consider this use
25 of the proposed evidence for the purpose for
26 which the accused says he intends it, the jury
27 will have to embark on a collateral inquiry;

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1 i.e., to consider the evidence of the
2 complainant's denial of prior sexual activity
3 when questioned by the investigating police
4 officer versus the accused's evidence at the
5 trial that there was indeed prior sexual
6 activity. And the jury will have to accept the
7 accused's evidence and decide that prior sexual
8 activity did occur before the jury could then

9 make very limited use of that finding on the
10 issue of weighing the credibility of the
11 complainant as a witness at the trial.

12 There is a real danger that the jury, in
13 embarking on that collateral inquiry, will be
14 distracted from their main inquiry and that is
15 whether the prosecution has proven that there was
16 non-consensual sexual activity on September 27th,
17 2008 as alleged in the Indictment.

18 The factual determination of whether or not
19 there was sexual activity between the complainant
20 and the accused in June or July 2008 would be as
21 difficult or more difficult for the jury to
22 resolve than the factual issues directly related
23 to the charge in the Indictment.

24 Although one can understand the
25 investigating police officer asking the question
26 he did of the complainant during the taking of
27 her statement, it was not a necessary question

Official Court Reporters 4

1 nor was it relevant to the allegation she was
2 making against the accused. The topic of prior
3 sexual activity was not part of the complainant's

4 narrative in giving her statement to police but,
5 rather, was a collateral question or collateral
6 topic raised by the police officer during the
7 interview. This distinguishes the present case
8 from the factual situation in the Crosby decision
9 in the Supreme Court of Canada where the topic of
10 prior sexual activity was inextricably tied in
11 with the complainant's narrative in her statement
12 to the police about the charge under
13 investigation.

14 The claim of relevance of the proposed
15 evidence is tenuous at best. Its probative value
16 is substantially outweighed by its prejudice in
17 the sense that it will undoubtedly lead the jury
18 away from its main task and more importantly
19 there is a risk that the jury will make improper
20 use of the proposed evidence; i.e., to draw the
21 impermissible inferences that the Seaboyer rules
22 and the Section 276 rules were designed to
23 prohibit; that is, that by reason of prior sexual
24 activity the complainant is likely to have
25 consented to the sexual activity which forms the
26 subject matter of the charge before the jury.

27 In all of the circumstances, I find that

1 there is not a reasonable prospect that the
2 proposed evidence will assist the jury in
3 arriving at a just determination of this case.

4 When one looks at the words in the accused's
5 affidavit filed in support of his application, it
6 appears that the accused holds the view that the
7 mere fact of prior sexual activity means that the
8 complainant is less worthy of belief when she
9 asserts a complaint of sexual assault.

10 For more than 20 years the Courts in Canada
11 have stated that that is an improper inference or
12 line of reasoning. Parliament, in Section 276,
13 confirmed that it is an improper inference. In
14 the circumstances of the application before the
15 Court today, the Court has a duty to remove such
16 discriminatory reasoning from the fact-finding
17 process.

18 I take into account these and the other
19 factors listed in subsection 276(3) of the
20 Criminal Code, including the right of the accused
21 to make full answer and defence.

22 Upon careful consideration of the evidence
23 and the submissions on this application, I find
24 that the accused has not established that the
25 proposed evidence has significant probative value
26 that is not substantially outweighed by the

1 of justice. It is my ruling that the proposed
2 evidence is inadmissible at the accused's jury
3 trial.

4 I will just add that a criminal trial is a
5 dynamic process and in as much as this ruling is
6 made in advance of the actual trial evidence, any
7 such ruling on admissibility is subject to being
8 revisited as the actual trial evidence unfolds.

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14 Certified to be a true and
15 accurate transcript pursuant
to Rules 7 23 and 7 24 of the
16 Supreme Court Rules,

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Lois Hewitt, CSR(A), RPR, CRR
Court Reporter

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Official Court Reporters 7