*R v Simon,* 2018 NWTSC 60 **S-1-CR-2017-000091**

# IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**- v -**

**JOHNNY SIMON**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_** Transcript of the Ruling of The Honourable Justice L.A. Charbonneau, sitting in Yellowknife, in the Northwest Territories, on the 5th day of September, 2018.

# \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ APPEARANCES:

Ms. A. Piché: Counsel for the Crown

Ms. K. Oja: Counsel for the Accused

(Charges under s. 271 of the *Criminal Code*)

**There is to be no publication or broadcast of any information that could identify the complainant**

**( s . 486 . 4 )**

**There is to be no publication or broadcast of this decision until such time as the jury retires to consider**

**its verdict ( s . 648 )**

**There is to be no publication or broadcast of the contents of the Application , the evidence adduced , and**

**the submissions made at the hearing ( s . 278 . 9 )**

**Subject to the s . 486 . 4 and s . 648 bans , there is no publication ban on the decision itself**

1. THE COURT: This is my Ruling on
2. Mr. Simon's Application for production of records
3. pursuant to section 278.3 of the *Criminal Code.*
4. A number of publication bans apply to this
5. decision.
6. First, there is an order banning the
7. publication of any information that could
8. identify the complainant pursuant to section
9. 486.4 of the *Criminal Code*. There is also a
10. publication ban in effect with respect to the
11. entire application and this decision until such
12. time as the jury has retired to consider its
13. verdict, pursuant to section 648 of the *Criminal*
14. *Code*. Finally, there is a publication ban on the
15. contents of the application, the evidence
16. presented, the information provided, the
17. submissions made at the hearing, including the
18. identity of anyone referred to in the records
19. that were referred to, pursuant to section
20. 278.9(1)(a) and (b) of the *Code*. There is a
21. further potential ban that applies to this Ruling
22. that I have the power to lift. I will hear from
23. counsel at the end as to whether you are of the
24. view that this is a case where it should be
25. lifted.
26. I am going to be referring to the
27. complainant and other persons referred to on the
28. record that were the subject of this Application,
29. by using initials only.
30. Johnny Simon is charged with having sexually
31. assaulted H.K. on February 5th, 2017. His jury
32. trial is scheduled to proceed in Inuvik in

6 October 2018. Mr. Simon has filed an Application

1. pursuant to section 278.3 of the *Criminal Code.*
2. He seeks the production of RCMP's investigative
3. file in relation to a separate sexual assault
4. complaint made by H.K. against another
5. individual, W.M.
6. The circumstances leading to this
7. application are unusual. Ordinarily, when an
8. accused applies for the production of records in
9. the possession of third parties, neither the
10. Crown nor the accused has seen the records that
11. are the subject of the application. Things are
12. different in this case because Mr. Simon's
13. counsel happened to be counsel on a circuit where
14. W.M.'s matter was to be spoken to. And in that
15. capacity, she was given the disclosure package
16. for that file. Accordingly, she has seen the
17. material. The Crown, obviously, has also seen
18. the materials.
19. Mr. Simon's counsel recognized that because
20. disclosure materials are provided to counsel
21. under certain undertakings, she could not use the
22. materials in the W.M. file in the defence of
23. another client, unless the Crown consented.
24. Because the Crown did not agree that the
25. materials should be used in this case,
26. Mr. Simon's counsel filed this Application for
27. production of the documents to her in her
28. capacity as Mr. Simon's counsel. No one has
29. suggested otherwise, but I want to make it clear
30. that, in my view, Mr. Simon's counsel has handled
31. this somewhat unusual and awkward situation in an
32. exemplary manner.
33. It goes without saying that under the
34. circumstances, counsel have been able to provide
35. me with a lot more information about the contents
36. of the records than would normally be the case in
37. an Application like this one, but that has no
38. bearing on the legal framework that applies. It
39. is the same in this case as it would be in any
40. other Application of this sort.
41. As far as the allegations against Mr. Simon,
42. I have been referred to the pretrial conference
43. report, which includes a synopsis of the
44. allegations. I have also been provided
45. transcripts of things H.K. said about the matter
46. at different times. I have transcripts of the
47. calls received by the RCMP's communication
48. centre, when she called police and first
49. disclosed this matter on February 5th. It is an
50. admitted fact between the parties that she was
51. intoxicated at the time she made those calls. I
52. also have transcripts of the four statements she
53. gave to police about this matter.
54. The allegations, based on the pretrial
55. conference report and other information provided
56. at the hearing, can be summarized as follows: On

9 February 6th, H.K. had spent time at a residence

1. in Inuvik. Later that day, she met Mr. Simon.
2. They drank alcohol together. They went to
3. different locations, and eventually returned to
4. the residence where H.K. had been previously that
5. day, to get more alcohol.
6. She says Mr. Simon used a metal object to
7. break into the apartment. She says, at some
8. point, he dragged her to the emergency stairwell
9. on the top floor. He held her by her arm, took
10. her clothes off, and had forced sexual
11. intercourse with her. After the assault, she
12. went to the warming shelter and reported the
13. matter to RCMP. She was brought to the hospital
14. where a sexual assault examination was done. The
15. examining doctor noticed scratches on her back.
16. A break-in was reported at the residence in
17. question at 9:15 that night. Mr. Simon was
18. arrested a few hours later. He had a metal
19. object on him. DNA testing confirmed the
20. presence of H.K.'s DNA on a penile swab seized
21. from Mr. Simon, and the presence of Mr. Simon's
22. DNA on a vaginal swab taken from H.K. during the
23. sexual assault examination. The issue at trial
24. is expected to be consent.
25. The information I was provided about the
26. substance of the W.M. complaint is that it was
27. for a sexual assault of H.K. alleged to have
28. happened on January 29th, 2017. She reported
29. this to police a short time after the alleged
30. events. She gave a statement to police about
31. those events a week later, on the same day as the
32. day she says the events involving Mr. Simon
33. happened.
34. I was told that the statement H.K. gave
35. about the W.M. incident was very vague. I also
36. heard about inconsistencies between what she is
37. reported to have told the nurse when she
38. underwent a sexual assault examination following
39. that complaint and what she told police in her
40. statement.
41. First, there is a note in the nurse's report
42. to the effect that H.K. said, during the
43. examination, that the assault took place outside
44. the Mac's News Stand in Inuvik, that she was
45. dragged up the stairs. In her statement to
46. police, she said the assault happened in an area
47. between the RCMP detachment and the Mad Trapper.
48. Both of these locations are on Mackenzie Road in
49. Inuvik, but in different areas of the road.
50. Second, there is a note in the nurse's
51. report stating that H.K. said the assault
52. happened after she had gone to the warming
53. shelter, whereas in her statement to police, she
54. said it happened before she went to the warming
55. shelter.
56. I was also advised that on the W.M. matter,
57. the results of the DNA testing came back
58. negative. The Crown directed a stay of
59. proceedings on that charge.
60. Also, by way of additional context, defence
61. counsel drew my attention to portions of H.K.'s
62. cross-examination at the preliminary hearing on
63. Mr. Simon's matter. During this portion of her
64. evidence, H.K. acknowledged that during the time
65. frame in question, she was drinking every day to
66. the point of blacking out, and that this had been
67. going on for some months. I mention this now
68. because it ties into aspects of the Defence's
69. argument as to why the W.M. file should be
70. produced.
71. Defence argues that the W.M. file should be
72. produced for my review and also produced to
73. Defence because it is necessary for Mr. Simon to
74. have those records in order to make full answer
75. and defence. The Defence's intention, if this
76. Application is granted, is to file a further
77. Application pursuant to section 276 of the
78. *Criminal Code* and seek leave to cross-examine
79. H.K. about the details of her complaint against
80. W.M. Defence would argue, in the context of the
81. section 276 Application, that cross-examination
82. on that complaint is relevant to H.K.'s
83. credibility and the reliability of her account of
84. what happened with Mr. Simon.
85. The Crown opposes production, arguing that
86. the W.M. complaint is not relevant and that it
87. has, if any at all, minimal probative value.
88. It is undisputed that the W.M. file is a
89. record within the meaning of section 278.1 and is
90. not covered by the exemption set out in the
91. definition. This section does exempt from the
92. statutory scheme, "Records made by persons
93. responsible for the investigation or prosecution
94. of offences".
95. However, that exemption applies only to
96. records made for the investigation of the offence
97. charged, and not to records made in the context
98. of just any investigation. That was confirmed in
99. *R. v. Quesnelle,* 2014 SCC 46.
    1. The regime contemplates a two-step process.
    2. The first step is for the judge to decide whether
    3. the records should be produced for inspection by
    4. the judge. Section 278.5. If the judge decides
    5. that it should be, the judge then examines the
    6. record and considers, as a second step, whether
    7. the record should be produced to the accused.
    8. Sections 278.6 and 278.7. At both stages of the
    9. analysis, the judge is required to consider the
    10. salutary and deleterious effects of the decision
    11. on the accused's right to make full answer and
    12. defence, and on the rights of privacy, personal
    13. security, and equality of the complainant, and of
    14. any other person to whom the record relates.
    15. Specific factors listed at section 278.5(2)
    16. are to be considered, they include:

17

1. (a) the extent to which the record is necessary to make full answer and
2. defence; (b) the probative value of the record; (c) the nature and extent
3. of the reasonable expectation of privacy with respect to the record;
4. (d) whether production of the record is based on a discriminatory belief
5. or bias; (e) the potential prejudice to the personal dignity and right to
6. privacy of any person to whom the record relates; (f) society's
7. interest in encouraging the reporting of sexual offences; (g) society's
8. interest in encouraging and obtaining of treatment by complainants of
9. sexual offences; (h) the effect of the decision on the integrity of the
10. trial process.
    1. At the first step of the process, section 278.5
    2. states that the judge may order production if
    3. three criteria are met. The first criterion is
    4. that the Court must be satisfied that the
    5. application was made in accordance with the
    6. statutory requirements that govern these matters.
    7. In this case, that criterion is met. The
    8. application meets the requirements of the
    9. *Criminal Code*. Although service on H.K. and W.M.
    10. was a short service, I am satisfied that service
    11. is valid. Based on the Crown's representations,
    12. I am satisfied that H.K. has been made aware of
    13. her right to be represented at this hearing and
    14. to participate, and that she does not wish to.
    15. I am also satisfied, based on Mr. Simon's
    16. counsel's representations, that W.M. was aware of
    17. this matter, that steps were taken to ensure that
    18. he had the opportunity to obtain legal advice
    19. about this matter and participate, but that he
    20. declined to avail himself of that opportunity. I
    21. infer from that that he did not wish to
    22. participate or be represented at this hearing
    23. either.
    24. The next criterion is that the accused has
    25. established that the record is likely relevant to
    26. an issue at trial, or to the competence of the
    27. witness to testify. Here, the question is solely
11. whether the record is likely relevant to an issue
12. at trial. And, finally, the last criterion is
13. that the production of the record is necessary in
14. the interests of justice.
15. As I mentioned already, the purpose of
16. Defence in seeking production of these records is
17. to use them as a basis to file a section 276
18. Application with a view of enabling Defence to
19. cross-examine H.K. about the details of her
20. complaint against W.M. As everyone acknowledged,
21. the admissibility of this evidence, pursuant to
22. the section 276 regime, is not what I have to
23. decide at this stage. But because the second
24. criterion to be met is linked to relevance, and
25. because the factors to be considered include
26. probative value, the section 276 regime is part
27. of the context in which this Application must be
28. examined. Indeed, most of the authorities filed
29. by counsel are decisions on 276 Applications.
30. A number of cases have addressed the
31. relevance of unrelated complaints of sexual
32. assault in the context of sexual assault trials.
33. One authority that is often relied on in this
34. context is *R. v. Riley* (1992) 11 O.R. (3d) 151, a
35. decision from the Ontario Court of Appeal.
36. The often quoted passage of this relatively
37. short decision is to the effect that the only
38. legal basis that can justify cross-examination on
39. an unrelated sexual assault complaint is to lay
40. the foundation for a pattern of fabrication. The
41. Court of Appeal said in *Riley* that this should
42. not be encouraged unless defence could show that
43. the complainant recanted the allegation or that
44. the complaint was demonstrably false.
45. The decision is now somewhat dated, but it
46. was referenced by the same court more recently in
47. *R. v. M.T.,* 2012 ONCA 511, at paragraph 52.
48. Defence argues that the requirement of
49. demonstrated falsehood is too strict, and that
50. subsequent cases have illustrated that there are
51. other circumstances where cross-examination of a
52. complainant on unrelated complaints may be
53. relevant and very probative.
54. I agree that the relevance of an unrelated
55. complaint may come from something other than the
56. demonstration of its falsehood. If there are a
57. series of complaints that are strikingly similar,
58. for example, they may be probative of a pattern
59. of fabrication, even if there is no actual
60. demonstration or proof that any of them are
61. false.
62. The facts in *R. v. Anstey,* 2002 NFCA 7 are a
63. good example. In that case, the complainant had
64. made very similar allegations about, effectively,
65. a third of the male population of a small
66. community. And in each of those complaints, she
67. alleged that the perpetrator had said very
68. similar, quite distinctive things to her during
69. the course of the assault.
70. There was nothing extrinsic to demonstrate
71. that any of the allegations were false, but it
72. was at least arguable that the striking
73. similarities between them, in and of itself,
74. raised issues about the implausibility of all
75. these different men having, on separate
76. occasions, done the exact same thing and said the
77. exact same things to the complainant.
78. I pause here to mention that while I refer
79. to this case for its facts, and with the greatest
80. of respect, I disagree with the legal analysis
81. and approach that the Court of Appeal adopted in
82. dealing with the issue of admissibility of this
83. evidence. I disagree with that approach
84. essentially for the reasons outlined by Professor
85. Elaine Craig in her article "Section 276
86. Misconstrued: The Failure to Properly Interpret
87. and Apply Canada's Rape Shield Provisions",
88. (2016) 94-1, Canadian Bar Review 96.
89. I am not here dealing with a section 276
90. Application, so I do not think this is the proper
91. case to embark on a detailed discussion about
92. this. But I will say only that I agree with
93. Professor Craig that it appears from some of the
94. cases she refers to in that article that the
95. exclusionary rule set out at paragraph 276(1),
96. is, at times, conflated and confused with the
97. admissibility rule set out at paragraphs 276(2)
98. and (3). The difference between these two things
99. is aptly summarized by the Ontario Court of
100. Appeal in *R. v. M.T.,* at paragraphs 39 to 43.
101. Returning to situations where a
102. demonstration of falsehood may not be necessary
103. to render extrinsic sexual assault allegations
104. relevant or probative, another example is when
105. the other allegations are probative of a motive
106. to fabricate.
107. *R. v. G.S.* [2007] O.J. No. 1645, referred to
108. by Defence, is an excellent example of that. The
109. complainant, a child, had made separate
110. complaints of sexual assault against the two men
111. who had been her mother's boyfriends, after her
112. mother and father had separated. There was also
113. evidence that she wished her parents to be back
114. together, and did not want her mother to have
115. boyfriends.
116. The second boyfriend, who was the one on
117. trial, applied to cross-examine her about her
118. allegations against the first boyfriend. In that
119. example, again, there was no demonstrated
120. falsehood of the allegation against the first
121. boyfriend, but the Court concluded, and
122. rightfully so in my view, that the similarity of
123. the conduct alleged, and more importantly, the
124. relevance of the other allegation to the motive
125. to fabricate in the overall context of the case,
126. rendered the other allegations relevant and
127. probative.
128. Yet another example is where the evidence
129. about the other allegations raise issues of
130. possible transference or confusion between two
131. separate events. That was the situation in the
132. third case relied on by Defence, *R. v. G.W.,* 2011
133. ONSC 1361. In that case, the complainant, in the
134. middle of testimony at a trial, where she was
135. alleging that her step-father had sexually abused
136. her, disclosed during a break that her biological
137. father had also sexually abused her. This was
138. found to be relevant both because it was
139. inconsistent with her having spoken very
140. positively about her biological father on earlier
141. occasions, and because it raised the possibility
142. of transference.
143. In that situation, the potential probative
144. value of the other allegation did not come from
145. any demonstration of its falsehood. On the
146. contrary, in that case, the theory of the Defence
147. was that the other allegation was true, and that
148. the complainant had transferred the abuse she
149. sustained at the hands of one person, her
150. biological father, to another person, the
151. accused.
152. Of course, it does not mean that this theory
153. would necessarily be accepted by the trier of
154. fact, but it is another illustration that
155. evidence may be relevant or probative, even if it
156. does not fall within the strict parameters set
157. out in *Riley*.
158. These examples show that the *Riley* approach
159. does not capture all the situations where
160. evidence of other complaints of sexual assault

16 may be relevant and probative. There could be

1. other situations where the same is true.
2. In my respectful view, relevance must be
3. approached on a principled, case-by-case basis,
4. not on the basis of rigid categories and
5. pigeonholes. This is very much in line with the
6. evolution of the law of evidence in various
7. areas, the most obvious example being the
8. admissibility of hearsay.
9. I have referred to cases where extrinsic
10. sexual assault allegations were found to be
11. relevant. There are, of course, many cases where
12. such allegations were found not to be relevant.
13. A very useful case, in my view, is the
14. Ontario Court of Appeal decision in *M.T.*, which I
15. have already referred to. The complainant in
16. that case was a child. The accused was her
17. uncle, and was alleged to have sexually abused
18. her over a period of time. In the same statement
19. where she disclosed that abuse, she also said she
20. had been sexually abused by her father and that
21. this had happened before the abuse at the hands
22. of her uncle. The issues at that trial were
23. whether the alleged conduct had happened at all,
24. and, if so, the identity of the perpetrator.
25. The accused made application, pursuant to
26. section 276, seeking to cross-examine the
27. complainant about the allegations involving her
28. father. That application was dismissed. The
29. accused was convicted, and the section 276 ruling
30. became one of the grounds of appeal.
31. The Court of Appeal found that the evidence
32. of the complaint against the biological father
33. was simply not relevant to the issue of identity.
34. The Court noted, at paragraph 49, that evidence
35. of non-consensual sexual activity with one person
36. is not probative of the falsity of an allegation
37. of non-consensual activity with another.
38. The Court also noted that although the two
    1. complaints were made at the same time and there
    2. was a connection in that respect, they were quite
    3. distinct. The complainant said that the abuse at
    4. the hands of the father had stopped by the time
    5. the abuse at the hands of the accused had begun.
    6. The allegations also involved different locations
    7. and different behaviors.
    8. At paragraph 52, the Court concluded that
    9. reduced to its essence, the claim that the
    10. evidence of the other complaint was relevant
    11. amounted to an argument that because the
    12. complainant was saying that two different persons
    13. had abused her sexually at different times, she
    14. was more likely to be lying about one of them
    15. than if she was accusing only one person. It
    16. found the evidence of the other complaint was not
    17. relevant, and it also found that it would be
    18. inadmissible, because of lack of relevance, even
    19. leaving aside the statutory framework and the
    20. special admissibility rules set out in section

21 276.

1. Returning to the present Application, the
2. Defence says that the W.M. complaint is relevant
3. to the credibility of H.K., as well as the
4. reliability of her account of what occurred with
5. Mr. Simon.
6. The first reason Defence argues is that the
   1. W.M. complaint meets the "demonstrably false"
   2. threshold, or is very close to meeting that
   3. threshold. Defence bases this on the vagueness
   4. of the H.K. allegations against W.M. and on the
   5. inconsistencies between what she is reported to
   6. have said to the nurse and what she told police
   7. about the events. As I have already noted those
   8. inconsistencies related to where the assault
   9. occurred, as well as the timing of events in
   10. relation to when she went to the warming shelter.
   11. Defence also relies on the "striking
   12. similarity" line of argument. More specifically,
   13. that in both cases H.K. describes the perpetrator
   14. as throwing her down, describes all her clothes
   15. being removed, and describes an act of vaginal
   16. intercourse. Defence suggests, in particular,
   17. that the allegation that every item of H.K.'s
   18. clothing was removed is a strikingly unusual
   19. feature for a sexual assault committed in a
   20. public, or semi-public area.
   21. The second reason Defence says the W.M.
   22. complaint is relevant is because of the
   23. possibility of transference, confusion, or
   24. co-mingling on H.K.'s part of what happened with
   25. W.M. and what happened with Mr. Simon. That line
   26. of relevance does not suppose that the allegation
   27. against W.M. is fabricated or false. On the
7. contrary, it supposes that something did happen
8. with W.M., that there has been some sort of
9. transference or co-mingling between those two
10. events in H.K.'s mind.
11. In support of that argument, the Defence
12. relies again on the similarities between the
13. allegations and on the temporal link between
14. them. As I mentioned earlier, the events leading
15. to the complaint against W.M. were alleged to
16. have happened on January 29th. It is an admitted
17. fact that it was reported, at first, within a day
18. or so, but that H.K. gave her statement to police
19. about this only a week later, on the same day
20. that she says the assault at the hands of
21. Mr. Simon took place.
22. Defence also relies on H.K.'s
23. acknowledgement about her heavy drinking and
24. frequent blackouts during the relevant time
25. frame. Defence argues that this increases the
26. possibility that events may have become confused
27. in her mind.
28. As I already said, to order production of
29. these records for my review, I must be satisfied
30. of their likely relevance and that their
31. production is necessary in the interests of
32. justice. In examining these criteria, I must
33. also consider this salutary and deleterious
34. effects of the decision on the accused's right to
35. make full answer and defence, and on the rights
36. of privacy, personal security, and equality of
37. H.K. In making those assessments, I must take
38. into account the factors listed at section

6 278.5(2).

1. In examining the concept of likely
2. relevance, I find it helpful to go back to how
3. Justice Watt described the concept of relevance
4. simpliciter in *R. v. M.T.* at paragraph 36. He
5. said:

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1. Relevance is a matter of day-to-day experience and common sense, not an
2. inherent characteristic of any item of evidence. Relevance exists as the
3. relationship between an item of evidence proposed for reception and
4. the proposition or fact the party tendering the evidence seeks to
5. establish by its introduction.

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19 He also said:

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1. An item of evidence is relevant if it makes the fact it seeks to establish
2. slightly more or less probable than the fact would be without that
3. evidence through the application of every day experience and common
4. sense.

25

1. Reframed this way, the issue becomes: Does
2. evidence about the W.M. complaint make the fact
3. that Defence seeks to establish (namely, a
4. pattern by H.K. of fabricating sexual assault
5. allegations, or that H.K.'s account of what
6. Mr. Simon did is unreliable because she may have
7. co-mingled or confused what happened between him
8. and what happened with Mr. M) slightly more
9. probable?
10. With respect to establishing a pattern of
11. fabrication, I am not persuaded that
12. cross-examination of H.K. on the W.M. complaint
13. would assist in attacking her credibility. This
14. is not, in my view, a situation where it can be
15. shown that the W.M. complaint is demonstrably
16. false. In my respectful view, it is nowhere near
17. that threshold and has no relevance on that
18. front. The stay of proceedings is not helpful in
19. this regard. Proceedings can be stayed for many
20. reasons. The Crown's decision to stay
21. proceedings simply cannot be equated with the
22. notion that the complaint was false, or that the
23. Crown thought it to be false. Even an acquittal
24. can mean anything between the trier of fact being
25. positively convinced that a complaint was false,
26. and a trier of fact believing that an accused is
27. probably guilty but still having a reasonable
28. doubt.
29. The vagueness of a complaint is not in and
    1. of itself an indication of falsehood either. It
    2. can be an indication of a lot of things,
    3. including a high level of intoxication at the
    4. time of the events. The same is true with the
    5. types of inconsistencies that emerge from what is
    6. before me as far as what H.K. told police, and
    7. what she reportedly told the nurse during the
    8. sexual assault examination. Nor do I find this
    9. to be a case where there are such striking
    10. similarities between the allegations to suggest
    11. that it is implausible that these two events
    12. could have occurred. The similarities are
    13. different from those in *Anstey* and are of a much
    14. more generic nature.
    15. I must also consider, quite aside from the
    16. question of demonstrable falsehood, whether this
    17. is one of those cases where the extrinsic
    18. complaint is relevant for other reasons. Here,
    19. there is no suggestion that the W.M. complaint is
    20. relevant because it suggests a motive to
    21. fabricate, so that is not not really in issue.
    22. As far as possible transference or confusion
    23. between the two events, again, I do not find the
    24. similarities that exist between the two events to
    25. be capable of leading to that conclusion. A
    26. sexual assault complainant being thrown to the
    27. ground or having her clothes removed is fairly
30. generic. In my view, it is not a particularly
31. distinctive feature, even acknowledging that
32. there are many cases where not all of the
33. complainant's clothes are removed. But, perhaps,
34. more importantly, when considering this question
35. of similarities in this type of analysis, one
36. must also consider the dissimilarities. And
37. here, there are several dissimilarities.
38. While the account of the W.M. complaint, I
39. am told, is very vague, the account of the
40. complaint involving Mr. Simon is quite specific.
41. There is a narrative of events for that day, a
42. location where things happened, a description of
43. how they entered the apartment. There is
44. independent evidence that there was, in fact,
45. sexual contact between them, and the issue on
46. this trial is going to be consent. This paints a
47. very different picture from the one that has been
48. brushed about the W.M. allegations.
49. In the Supreme Court of Canada decision of
50. *Darrach*, the Court said, at paragraph 58:

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1. It is common for the defence in sexual offence cases to deny that the
2. assault occurred, to challenge the identity of the assailant, to allege
3. consent, or to claim an honest but mistaken belief in consent. Evidence
4. of prior sexual activity will be rarely relevant to support a denial
5. that sexual activity took place or to establish consent.

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* 1. That point was noted in *M.T.* at paragraph 41.
  2. The Supreme Court of Canada reiterated this in
  3. *Quesnelle*, at paragraph 17, when it gave the fact
  4. that a complainant has reported sexual violence
  5. in the recent past as one of the examples of
  6. something that is not, without more, relevant.

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1. Here, the defence says this is one of those rare
2. cases and that there is more. I respectfully
3. disagree. I have kept in mind that the threshold
4. for relevance is quite low to start with, and
5. also that section 278.5 requires only that likely
6. relevance be established, not actual relevance.
7. But, under the circumstances of this Application,
8. I still do not think that threshold is met.
9. If I am mistaken about that, and even
10. assuming that the criterion of likely relevance
11. is established on the record before me, I am not
12. satisfied that the third criterion is met. I am
13. of the view that the production of these records
14. is not necessary in the interests of justice. I
15. have concluded, on the contrary, that in all
16. circumstances, production would be contrary to
17. the interests of justice having regard to the
18. factors set out at section 278.3(2).
19. The first factor is whether the record is
    1. necessary for Mr. Simon to make full answer and
    2. defence. I am not satisfied it is. Whatever
    3. H.K. would say about the separate allegation,
    4. that evidence, in my view, is not necessary for
    5. Mr. Simon to defend this charge. It has little
    6. to do with what H.K. claims he did, and her claim
    7. that the sexual activity between them was not
    8. consensual. The second factor, the probative
    9. value of this evidence, is somewhat related to
    10. the first one. I find the probative value of
    11. this evidence extremely tenuous. The reasons I
    12. gave for concluding it does not meet the
    13. threshold of likely relevance, are also the
    14. reasons why I find it has little to no probative
    15. value.
    16. The potential prejudice to H.K.'s personal
    17. dignity and right to privacy is another factor
    18. that must be considered. It would be even more
    19. engaged at the stage of deciding whether to order
    20. production of the record to Mr. Simon, because
    21. then Mr. Simon himself, in addition to his
    22. counsel, myself, and the Crown would have access
    23. to the details of the W.M. investigative file.
    24. But even at the first stage, which is
    25. concerned only with production to me as the trial
    26. judge, H.K.'s privacy interests and personal
    27. dignity cannot be overlooked. In my view, we
20. cannot and should not lose sight of the highly
21. sensitive and personal nature of the contents of
22. these types of records. We should not be too
23. quick to assume that having additional persons
24. gain access to the details of such complaints,
25. even just one person, even just the judge, does
26. not have an impact on a person's dignity and
27. right to privacy. Lawyers, judges, and others
28. who work in the criminal justice system read and
29. hear about such matters on a regular basis, but
30. that does not change the fact that for each
31. complainant who makes a statement about this type
32. of event, this is a highly personal and sensitive
33. subject matter
34. Finally, I am required to consider society's
35. interest in encouraging the reporting of sexual
36. offences. In my view, cross-disclosure of
37. unrelated sexual assault complaints would have a
38. very real impact on whether persons who are
39. sexually assaulted multiple times will choose to
40. report these events. To be sure, there are cases
41. where the probative value of the other evidence
42. and its importance to the accused making full
43. answer and defence will tip the scale in favour
44. of production, despite these concerns. But I
45. have concluded that this is not one of those
46. cases.
    1. Having carefully weighed all the factors,
    2. and the salutary and deleterious effects of
    3. ordering production, and of declining to order
    4. production, I have concluded that the W.M. file
    5. should not be produced to me for review. The
    6. Application is dismissed.

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# [Discussion about whether publication ban as to the

1. **decision should be lifted pursuant to section**

10 **278.9(c)]**

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1. Section 278.9(c) states that determination
2. of the Court on these types of Applications are
3. subject to a publication ban unless the judge,
4. after taking into account the interests of
5. justice and the right to privacy of the person to
6. whom the record relates, orders that the decision

18 may be published.

1. I have considered this, as well as counsel's
2. positions. The Crown, properly, noted that the
3. Court must consider H.K.'s privacy interests. On
4. the other hand, there is not a lot of
5. jurisprudence in this jurisdiction with respect
6. to these types of applications. The issues raised
7. on this Application, in my view, engaged
8. important principles that may well arise again in
9. the context of applications like this one or on
10. applications brought pursuant to section 276 of
11. the *Criminal Code*. H.K.'s privacy interests can
12. be protected through the use of initials in this
13. transcript and through the general ban on the
14. publication of any information that could
15. identify her. On the whole, in my view, it is
16. appropriate for me to exercise my discretion to
17. lift the publication ban that would otherwise
18. apply to this decision. Given that this is going
19. to be jury trial, by operation of section 648 of
20. the Criminal Code, this decision cannot be
21. published until the jury has retired to consider
22. its verdict. But once that publication ban is no
23. longer in effect, this decision will not be
24. subject to a ban pursuant to section 278.9

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17 **PROCEEDINGS CONCLUDED**

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# 1 CERTIFICATE OF TRANSCRIPT

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1. I, the undersigned, hereby certify that the
2. transcribed foregoing pages are a complete and
3. accurate transcript of the digitally recorded
4. proceedings taken herein to the best of my skill and
5. ability.
6. Dated at the City of Edmonton, Province of
7. Alberta, this 23rd day of September, 2018.

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1. Certified Pursuant to Rule 723
2. Of the Rules of Court

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1. Leanne Harcourt, CSR(A)
2. Court Transcriber

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