Date: 2024 12 16
Docket: S-1-CR-2023-000017

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

-and-

C (B)

RULING ON WHETHER *SEABOYER* APPLICATION IS REQUIRED

Publication Ban: There is a ban on the publication, broadcast or transmission of any information that could identify the complainant, pursuant to s 486.4 of the *Criminal Code*, RSC 1985, c C-46

[1] The accused is charged with sexual assault pursuant to s 271 of the Criminal Code. The Crown has applied pursuant to s 715.1 of the Criminal Code for a ruling with respect to the admissibility of the complainant's video recorded statement (the "Statement"). In support of the application, the Crown relied on an Agreed Statement of Facts signed by the Crown and defence counsel.

[2] The complainant was under the age of 18 years at the time the offence is alleged to have been committed, that the Statement was made within a reasonable time after the alleged offence, and that the Statement describes the acts complained of.

[3] The defence does not dispute that the preconditions of s 715.1 are met, subject to the complainant adopting the Statement.

[4] However, there is one aspect of the Statement on which the Crown seeks a ruling. Specifically, the complainant refers in the Statement to the fact that she had never had sex before the event that led to criminal charges being laid against the accused. This raises the issue as to whether a *R v Seaboyer* 1991 CanLII 76 (SCC)

[*Seaboyer*] application is required to determine the admissibility of portions of the Statement.

[5] The Crown takes the position that a *Seaboyer* application is not required. The defence position is that a *Seaboyer* application is required. The defence also indicates they would consent to the Statement being admitted if a *Seaboyer* application is held.

[6] For the following reasons, I agree with the Crown's position that no *Seaboyer* application is required and that the Statement is admissible, subject to the complainant adopting the Statement at trial.

[7] The specific portion of the Statement which is contentious is as follows:

> And then he told me that ahm…if we can do it, I said: "No" and then he's like "Why you're scared" and then I look at him, I was like this: "This is my first time." He's like: "Well don't tell no one." And then I was like: "What do you mean?" He…I'll … I'll do it. I"ll…" like ahm…he said we can do it but don't tell no one, I was like: "I don't wanna do it though." He's like: "Why? It's not gonna get sore." I was like "It's not that, it's just that…ahm..I don't wanna do it because I am not ready and that's … not yet" and then he said: "You're not interested in doing this stuff?" I'm like: "Not interested."

[8] The reference to "this is my first time", "I'm not ready" and "not yet" all suggest that the complainant had previously not had sexual intercourse and was a virgin.

[9] Section 276 of the *Criminal Code* prohibits the accused from adducing evidence with respect to a complainant's sexual history if the evidence is being adduced to support the inference that a complainant is more likely to have consented to the sexual activity that is the subject of the charge or is less worthy of belief (the "twin myths"). The Supreme Court of Canada in *Seaboyer* struck down an earlier version of s 276 as being overly broad and set guidelines for the admissibility of sexual conduct evidence. These guidelines have now been incorporated in the current s 276 of the *Code.*

[10] However, s 276 regime only applies to situations where the accused proposes to adduce evidence of a complainant's sexual history. It does not govern the situation where the Crown seeks to adduce evidence of a complainant's sexual history. In those instances, the principles respecting the admissibility of this

evidence as set out in *Seaboyer* continue to govern and the Crown must apply to lead evidence of prior sexual activity: See *R v Barton*, 2019 SCC 33 at para 80.

[11] Here, the Crown seeks to introduce the full Statement of the complainant, including the references to her lack of prior sexual activity, as set out in paragraph 7 above.

[12] Within that context, I must decide whether evidence of a *lack* of sexual activity constitutes sexual activity which requires a *Seaboyer* analysis as to whether it should be admitted at trial. Until the recent decision of *R v RV*, 2019 SCC 41 [*RV*], it was settled law that the physical status of virginity did not invoke the need for a s 276 application. See: *R v Pittiman*, 2005 CanLII 23206 (ON CA), aff'd 2006 SCC 9 ; *R v Brothers* 1995 ABCA 185. However, the decisions of the Ontario Court of Appeal (2018 ONCA 547) and Supreme Court of Canada in *RV* have led to a lack of clarity on this issue.

[13] In *RV*, at the trial court level, the Crown sought to adduce evidence as to the complainant's pregnancy supporting her sexual assault allegation. The application judge refused to allow the defence to cross-examine the complainant as to whether someone else could have impregnated the complainant, however, the application judge, without holding a separate s 276 application, ruled that the defence could question the complainant on her statement that she was a virgin.

[14] At the Ontario Court of Appeal, Paciocco, JA noted at para 78:

> To be sure, it is well settled law that a complainant can testify as to her virginity without triggering s 276. As explained in *R v Pittiman* (2005), 198 CCC (3d) 308, [2005] O.J. No. 2672 (Ont. C.A.) at para. 33, affirmed 2006 SCC 9, [2006] 1 S.C.R. 381 (S.C.C.), "evidence of a complainant's virginity is a question of physical fact" not a sexual experience.

[15] Justice Paciocco then went on to note that while the complainant's evidence about her virginity did not require a s 276 application, the application judge's decision to allow questioning on that statement without holding a s 276 application was an error in law. Permitting cross examination that challenges claims about the absence of sexual experience falls squarely within s 276: *RV* (2018 ONCA) at para 79.

[16] Ultimately, the Court of Appeal found that the failure to allow cross examination on the issue of whether someone else could have caused the pregnancy and proposing the alternative of questioning on the complainant's understanding of

virginity and the truthfulness of that statement, was critical to a fair trial and, as such, allowed the appeal.

[17] In overturning the Court of Appeal, the Supreme Court of Canada agreed that the application judge erred in not permitting cross examination on the issue of paternity, however, held that no substantial miscarriage of justice had occurred given the cross-examination which actually occurred. More importantly for the purposes of this application, Justice Karakatsanis noted:

> Whether sexual *inactivity* is captured by either s. 276 or the *Seaboyer* principles is not directly at issue before this Court. There is appellate authority stating that s. 276 does not prevent the complainant from testifying as to virginity: *R v. Pittiman* (2005), 198 C.C.C. (3d) 308 (Ont. C.A.), aff'd 2006 SCC 9 [2006] 1 S.C.R. 381, on a different point, at para. 33; *R. v. Brothers* (1995) 169 A.R. 122 (C.A.) at paras 26-29. However, these cases also recognize that admitting evidence of virginity raises further questions, including: (i) the inferences the finder of fact may be asked to draw from the fact of the complainant's virginity and (ii) how the accused may challenge this claim: see *Pittiman*, at paras 34-37; *Brothers*, at paras 30-35. While I leave this issue for another day, I agree with Paciocco J.A. that it would be incongruous to hold that the statement "I am a virgin" does not engage s. 276 while an answer to the contrary would clearly be a reference to sexual activity: para 79.

[18] Following *RV*, there has been a lack of clarity around whether a claim of virginity or lack of sexual activity engages s 276 or as here, the need for a *Seaboyer* application if adduced by the Crown. While Karakatsanis, J notes that she agrees with Paciocco, JA, a careful analysis of his reasons illustrates that he accepts the body of case law holding that virginity is a physical status and not a sexual experience covered under s 276 or a *Seaboyer* application. He is, however, clear that challenging that status squarely engages s 276.

[19] Furthermore, Karakatsanis, J notes that the issue of whether sexual inactivity is covered by s 276 or *Seaboyer* is not directly in issue and opines that she is leaving this issue for another day. At best, her comments are *obiter*.

[20] Since *RV*, appellate courts have struggled with whether evidence of a lack of sexual activity engages s. 276. In *R v Diakite*, 2023 MBCA 42 [*Diakite*], the Crown led evidence of virginity without an application and the evidence was relied on by both the Crown and the defence. The Court noted that while Karakatsanis, J's comments could be read as suggesting that the admissibility of evidence of virginity should be treated in the same fashion as evidence of other sexual activity, such a

finding would overturn "strong jurisprudence to the contrary from several courts of appeal": *Diakite* at p 17.

[21] Similarly, *R v Czechowski*, 2020 BCCA 277 noted the lack of clarity in this area but found, on the facts of that case, it was not necessary to deal with the specific issue: See para 36.

[22] Lastly, in *R v Kinamore*, 2023 BCCA 337, the Crown led text messages with respect to the complainant's lack of interest in a sexual relationship with the accused. No application was held to determine their admissibility prior to trial. On appeal after conviction, the BCCA held those messages were used for the purposes of weighing credibility and not for an impermissible inference and dismissed the appeal. Leave to appeal to the Supreme Court of Canada has been granted and, in part, the appeal raises similar issues to the case at bar.

[23] Given the strong appellate authority that the lack of sexual activity does not engage s 276 or *Seaboyer*, and the fact that the comments of Karakatsanis, J in *RV* were *obiter*, I am of the view that a *Seaboyer* application is not required with respect to the comments made by the complainant regarding her lack of sexual activity.

[24] If I am wrong with respect to the admissibility of the full statement of the complainant without a *Seaboyer* application, I also note that the position of the defence is that even if a *Seaboyer* application were to be held, they agree that the Statement should be admitted in its entirety subject to the complainant adopting the statement at trial.

[25] Notwithstanding the admissibility of the full statement of the complainant, I must stress that any questions that relate to challenging the evidence of the complainant with respect to her lack of sexual activity requires a s 276 application to be brought in advance of the trial in accordance with the procedures set out in s 278.93 and s 278.94.

S.M. MacPherson
J.S.C.

Dated at Yellowknife, NT, this
16th day of December, 2024

Counsel for the Public Prosecution Service of Canada:	Angie Paquin
Counsel for the Accused:	Tú Pham

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