

R. v. R.W.

2009 NWTTC 02
File: T-01-CR-2008001014

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

R.W.

Applicant

**REASONS FOR DECISION OF THE
HONOURABLE JUDGE ROBERT D. GORIN**

Application pursuant to section 276 of the *Criminal Code*

Heard at: *Yellowknife, Northwest Territories*

January 28, 2009

Date of Decision: January 28, 2009

Reasons Filed: January 30, 2009

Counsel for the Applicant: P. Falvo

Counsel for the Respondent: M. Himmelman

[Charges under ss. 271 CC, and 348(1)(a) CC

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REASONS FOR DECISION

1) INTRODUCTION

[1] The accused is charged with sexual assault and breaking and entering a dwelling house with intent to commit an indictable offence. On January 28th, 2009, prior to his preliminary inquiry, the accused applied for a hearing under section 276.2 of the *Criminal Code*. The purpose of the requested hearing was to determine whether counsel for the accused could cross-examine the complainant on two instances prior consensual sexual activity, in which, the accused alleges, the complainant and he participated.

[2] I denied the accused's application for a hearing and stated that written reasons would follow. These are my reasons.

2) ANALYSIS

[3] Subsections (1), (2) & (4) of section 276.1 of the *Criminal Code* state:

(1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 276.2 to determine whether evidence is admissible under subsection 276(2).

(2) An application referred to in subsection (1) must be in writing and set out,

(a) detailed particulars of the evidence the accused seeks to adduce, and

(b) the relevance of that evidence to an issue at trial,

.....

(4) Where the judge, provincial court judge or justice is satisfied

(a) that the application was made in accordance with subsection (2),

.....

the judge provincial court judge or justice shall grant the application and hold a hearing under section 276.2 to determine whether the evidence is admissible under subsection 276(2).

[4] The application which was before me was not made in accordance with subsection (2) of section 276.1. It is on that basis that I denied the accused's application for a hearing to determine whether the cross-examination would be allowed.

[5] The reason I found that the application was not made in accordance with subsection (2) is that the accused did not set out the relevance of the evidence to an issue at trial. Subsection (b) of (2) requires that the accused explain why the evidence of prior sexual activity is relevant. He has not done so.

[6] In the accused's application and affidavit in support he refers to the relevance of the evidence in issue on two occasions. In the sixth of the grounds he enumerates in support of his application, he states:

"The evidence of prior sexual activity is relevant, and necessary, to understand the formation by the Applicant of his real or mistaken belief in the Complainant's consent to the sexual activities she had with the accused;"

[7] In paragraph 4 of his affidavit in support the accused states:

"That in the case at hand, instances of alleged sexual activity in the complainant and the accused's past sexual history have significant probative value."

[8] The accused has not set out the relevance of the alleged instances of sexual activity upon which he wishes to cross-examine the complainant. The foregoing paragraphs are simply bare assertions of relevance. They provide no explanation of the relevance which he asserts.

[9] I am aware that the existing jurisprudence provides that one of the purposes of preliminary inquiries is to afford the accused discovery of the Crown's case. However, generally speaking, issues of admissibility are to be determined in the same manner as would be the case during a trial.

3) CONCLUSION

[10] In summary, the accused did not "set out" the relevance of the evidence of the alleged past sexual activity upon which he sought to cross-examine the complainant. Therefore, the accused's application for a hearing under section 276.2 was defective. The application was not made in accordance with the form and content required in subsection 276.1(2). One of the listed prerequisites for ordering a hearing, under subsection 276.1(4), was not present. It is on this basis that I denied the accused's application.

Robert D. Gorin
J.T.C.

Dated this 30th day of January, 2009 at
the City of Yellowknife in the Northwest Territories

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