

Ontario Superior Court of Justice

M. Bordin J.

Heard: May 13, 2024.

Judgment: June 4, 2024.

Court File No. CR-23-00000018-0000

[2024] O.J. No. 4766 | 2024 ONSC 2985

Between His Majesty the King, and A.S., Applicant

(51 paras.)

Case Summary

Criminal law — Evidence — Admissibility — Relevancy — Methods of proof — Circumstantial evidence — Complainant's sexual activity — Witnesses — Credibility — Children — Impeachment — Prior consistent statements — Prior inconsistent statements — Application by accused that sought to introduce two documents prepared by, and given to him, by the complainant which contained expressions of romantic interest and admiration towards the accused, granted in part — The documents contained content of a sexual nature and were subject to Section 276 — However, the court also determined that the evidence was capable of being admitted for the purpose of challenging the complainant's credibility and reliability, as the documents appeared to contradict the complainant's statements to the police about the nature of their relationship — The application proceeded to a stage two hearing.

Application by accused that sought to introduce two documents prepared by, and given to him, by the complainant which contained expressions of romantic interest and admiration towards the accused. The Crown's position was that the documents sought to be adduced were communications of a sexual nature captured by s. 276(4), were not relevant to consent, could give rise to twin-myth reasoning, did not satisfy the test for admission, were not capable of being admitted, and should not be admitted. The accused was charged with possession of child pornography and sexual assault against the 16-year-old complainant. The first document requested to be admitted was a single page handwritten document. The left side of the page contained what could be described as a poem. The poem was fashioned in a roses are red style. On the right-hand side of the page was another note which stated, to my dearest, and the love of my life. It referred to the accused working fast at work and concluded with, love you soooooo much, with the complainant's first name with two hearts drawn on either side. The second

document was left at the accused's residence by the complainant three to four days after he received the first document and while the complainant was visiting his residence when the accused was not present. It was a double-sided document.

HELD: Application granted in part.

The court found that the documents contained content of a sexual nature and were subject to Section 276. However, the court also determined that the evidence was capable of being admitted for the purpose of challenging the complainant's credibility and reliability, as the documents appeared to contradict the complainant's statements to the police about the nature of their relationship. The court ordered that the application proceed to a stage two hearing under Section 276, where a full analysis of the factors under Sections 276(2) and (3) would be conducted to determine the admissibility of the documents. The complainant should be advised of their right to appear and make submissions at the stage two hearing. If the documents were not subject to Section 276, the court could still find them capable of admission under Section 278.92 and direct the application to proceed to a stage two hearing.

Statutes, Regulations and Rules Cited:

Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(4), s. 271, s. 276, s. 276(2), s. 276(3), s. 276(4), s. 278.92, s. 278.92(2) (a), s. 278.92(3)

Counsel

Fraser McCracken, counsel for the Crown.

Brij Mohan, counsel for the Applicant.

PUBLICATION RESTRICTION NOTICE

By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the persons described in this judgment as the complainant and the accused may not be published, broadcasted, or transmitted in any manner. This judgment complies with this restriction so that it can be published.

REASONS ON STAGE ONE OF SECTION 278.92 APPLICATION

M. BORDIN J.

Overview of the Application and Summary of the Position of the Parties

1 A.S. is charged with possession of child pornography contrary to s. 163.1(4) of the *Criminal Code of Canada* and with committing sexual assault against A.L. (the "complainant") contrary to

section 271 of the *Criminal Code*. The complainant was 16 at the time of the alleged offence; the accused was 28.

2 The trial is scheduled before me for a seven day jury trial commencing October 15, 2024.

3 The accused seeks to adduce two documents prepared by and given to him by the complainant. The accused has brought an application under s. 278.92. The accused concedes the evidence sought to be adduced is a record within the meaning of s. 278.1 but submits that it is capable of being admitted and ought to be admitted. The accused says the documents are relevant to credibility and reliability of the complainant and contradict her statements to the police. The accused has not brought an application under s. 276 and submits the documents are not communications captured by s. 276 of the *Criminal Code*.

4 The Crown's position is that the documents sought to be adduced are communications of a sexual nature captured by s. 276(4), are not relevant to consent, give rise to twin-myth reasoning, do not satisfy the test for admission, are not capable of being admitted, and should not be admitted.

Background and Nature of the Evidence Sought to be Adduced

5 The complainant authored and gave the accused two documents. The first document was given directly to the accused by the complainant while they were both working at S in late May or early June of 2022.

6 The first document is a single page handwritten document. The left side of the page contains what can be described as a poem under the heading "Poem for [A.]" The poem is fashioned in a "roses are red" style. On the right-hand side of the page is another note which begins, "to my dearest [A.] and the love of my life". It refers to the accused working fast at work and concludes "now thats hot" and "love you soooooo much" with the complainant's first name with two hearts drawn on either side.

7 The second document was left at the accused's residence by the complainant three to four days after he received the first document and while the complainant was visiting his residence when the accused was not present. It is a double-sided document.

8 The top side of the first page of the second document contains a short message to the accused. It begins "love you [A.]" and "Dear [A.]". The message ends with, "I hope work went well have a good life" with a version of the complainant's name following.

9 The bottom half of the first page of the second document contains a drawing of two figures holding heart shaped balloons. The word "you" is written in one balloon and the other balloon has the word "me!" The word "me" is above the figure with long hair.

10 The top side of the second page of the second document contains a drawing and a description. The description states, "Us madly in love watching a lovely sunset." The drawing reflects the description.

11 The bottom of the second page of the second document contains another drawing and a description. The description states, "We are swimming, and you are showing off your huge sexy muscles." The drawing depicts two figures swimming with the words "you" and "me" written above the figures.

12 The accused's position is that the documents are relevant to the complaint's credibility and reliability. The accused says that the documents demonstrate feelings of affection and romantic interest in the accused. On the other hand, in her statement to the police, the complainant repeatedly describes her relationship with the accused as "friends".

13 In her statement to Detective Narancsik dated June 17, 2022, A.L. advised police the following (Page 62, last line):

COMPLAINANT: I didn't want like a romantic relationship with him.

DET. NARANCSIK: Just a friendship?

COMPLAINANT: Just a friendship.

14 Further, the complainant, referring to the accused, says, "I guess you could say like work friends."

Production of Police Statement to the Court

15 The Crown does not take issue with the statements made by the complainant to the police as set out above. However, it submits that the court should have a complete copy of the statement to determine the issues before the court.

16 The accused's position is that I should not have a copy of the complete statement because, if the case is taken away from the jury and I am the trier of fact, I should not see the statement if it is not admissible.

17 I do not agree with the accused's reasons for why the complete statement should not be provided to me. Trial judges routinely see evidence which is not admissible and disabuse themselves of the evidence. However, I do not require the complete statement to determine the issues at stage one of the application.

Section 278.92

18 Pursuant to s. 278.92, the evidence sought to be adduced by the accused is inadmissible unless

a judge, provincial court judge or justice determines, in accordance with the procedures set out in ss. 278.93 and 278.94:

- (a) if the admissibility of the evidence is subject to section 276, that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3); or
- (b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

19 The regime under s. 278.92 was enacted with a view to: (1) protecting the dignity, equality, and privacy interests of complainants; (2) recognizing the prevalence of sexual violence in order to promote society's interest in encouraging victims of sexual offences to come forward and seek treatment; and (3) promoting the truth-seeking function of trials, including by screening out prejudicial myths and stereotypes: *R. v. J.J.*, 2022 SCC 28, at para. 139.

Application Required

20 Pursuant to s. 278.93(2), the accused must prepare an application in writing which "set[s] out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial": *J.J.*, at para. 22.

21 As noted in *J.J.*, at para. 82, s. 278.93(4) stipulates the following:

- (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2). [Emphasis in original.]

22 Further, "previously" refers to the stage one inquiry where the presiding judge determines whether a stage two hearing is necessary. The Crown and clerk of the court must have at least seven days' notice of the application before it is reviewed by the judge at stage one. However, s. 278.93(4) provides that the judge can exercise discretion to truncate the notice period in the "interests of justice": *J.J.*, at para. 84.

23 The Crown concedes that these requirements have been met.

Stage One

24 At stage one, the presiding judge reviews the accused's application to determine whether the evidence sought to be adduced is capable of being admissible having regard to the threshold tests set out in s. 278.92(2)(a) and (b) and the applicable factors in ss. 276(3) and 278.92(3), depending on the type of evidence: *J.J.*, at para. 23.

25 For s. 276 evidence applications, if the judge determines that the proposed evidence is not s. 276 evidence, the application will terminate. If the proposed evidence is s. 276 evidence, but the judge concludes that it is not capable of being admissible under s. 276(2) (as directed by s. 278.92(2)(a)), the application will be denied. If the s. 276 evidence is capable of being admissible, the application proceeds to a stage two hearing pursuant to s. 278.93(4): *J.J.*, at para. 28.

26 For private record applications in the possession of the accused, if the judge determines that the proposed evidence is not a "record" under s. 278.1, the application will terminate. If the proposed evidence is a "record" under s. 278.1, but the judge concludes that it is not capable of being admissible under s. 278.92(2)(b), the application will be denied. If the evidence is a "record" and it is capable of being admissible, the application proceeds to a stage two hearing pursuant to s. 278.93(4): *J.J.*, at para. 29.

27 If I determine that the evidence falls under both categories, then it is treated as s. 276 evidence: *J.J.*, at paras. 34 and 69.

Section 276 - Communication for a Sexual Purpose or Whose Content is of a Sexual Nature

28 First, I must determine whether the evidence falls under s. 276: *J.J.*, at para. 69.

29 For s. 276 to apply, the evidence sought to be tendered or adduced by the accused must be sexual activity other than the sexual activity that forms the subject matter of the charge, whether with the accused or with any other person: *J.J.*, at paras. 65-67. The documents do not relate to the sexual activity that forms the subject matter of the charge.

30 Section 276(4) provides that for the purposes of s. 276, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature. The Crown submits that the documents contain content of a sexual nature. The accused submits that the documents are not communication made for a sexual purpose or whose content is of a sexual nature.

31 The accused says that expressions of romantic interest and admiration or of love do not necessarily involve communication for a sexual purpose or content of a sexual nature. This is true. Whether they express content of a sexual nature is contextual and dependent on the content of the communications. The accused says that the documents do not reference past sexual activities or

even events, but rather are forward looking. As described by the accused, they are the complainant "dreaming" about what may be in the future.

32 The accused cites *R. v. G.E.*, 2020 ONCJ 451, at paras. 51 and 54, where the court found that text messages between the complainant and the accused were the "modern equivalent of love letters" which expressed affection or endearment for each other and were "records" under s. 278. *G.E.* assists in determining whether the messages are records, but not whether they are captured by s. 276, as there is insufficient information as to the content of the messages and the analysis of the court in *G.E.* was focused on whether the documents were records.

33 The Crown submits that it makes little sense to exclude "love notes" attributed to the complainant from the 276 regime and that the documents are of a "sexual nature". The Crown points in part to the references to "sexy muscles" and describing the applicant's actions as "hot". The Crown asserts that the notes indicate a romantic interest amounting to content of a sexual nature in these circumstances.

34 The Crown relies on *R. v. O.F.*, 2022 ONCA 679, where the court held on a 276 application that evidence the complainant flirted and made physical contact with the accused that suggested she was sexually interested in him was inadmissible. It was implicitly accepted by the Court of Appeal that flirting and physical touching initiated by the complainant was prior sexual activity for the purposes of appellate analysis.

35 The Crown also relies on the majority decision in *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, in which the evidence sought to be introduced by the accused that he and the complainant were "friends with benefits" and in a sexual relationship should not have been admitted under s. 276 because its only use was to support the prohibited inference that because the complainant had consented in the past, she was more likely to have consented on the night in question.

36 Evidence of a relationship that implies sexual activity engages s. 276: *Goldfinch*, at para. 42.

37 As a further example, the Crown submits that even "sexting" is captured by s. 276 and the fact of sexting does not necessarily indicate an interest in engaging in sex with someone.

38 Section 276(4) captures communication made for a sexual purpose or whose content is of a sexual nature. These must be taken to be two different types of communication. In my view, the first category is narrower than the second. Communication for a sexual purpose is just that. It may be to communicate an interest in sex, to arrange sex, or discuss a sexual encounter. On the other hand, content of a sexual nature is broader. It may not necessarily be directed at communication for a sexual purpose, but rather captures content which is of a sexual nature such as an expression of desire for someone that extends beyond admiration and appreciation, but which does not contain a specific sexual purpose.

39 The context here is that the complainant, who worked with the applicant but who otherwise did not have a relationship with him, wrote and provided to the accused the two documents which can be characterized at a minimum, as expressions of romantic interest and admiration. The documents express a deep desire, a belief that the two persons are meant to be together, and contain words like "hot" and "sexy" which are understood to be of a sexual nature. The documents and context of their delivery can be described as flirtatious, suggestive of a sexual interest, or a desire for a relationship that implies sexual activity. I find that, given their context and content, the documents are communications containing content of a sexual nature and are subject to s. 276.

40 For the purposes of stage one under s. 276, I am to determine whether the evidence is capable of being admissible, not whether it will ultimately be admissible.

41 As noted by the majority in *Goldfinch*, a s. 276 application requires the accused to positively identify a use of the proposed evidence that does not invoke twin-myth reasoning. In other words, relevance is the key which unlocks the evidentiary bar, allowing a judge to consider the s. 276(3) factors and to decide whether to admit the evidence. Bare assertions that the evidence will be relevant to context, narrative, or credibility cannot satisfy s. 276.

42 Bearing in mind the requirements of s. 276(2) and the factors in s. 276(3), but without making findings on those requirements and factors, I find that the evidence is capable of being admitted.

43 I agree with the Crown that the documents do not shed any light on whether the complainant consented to sexual intercourse with the accused. If tendered for that purpose, they would violate the prohibition against twin-myth reasoning prohibited by the 276 and 278.92 regime.

44 The accused submits that he is not seeking to adduce the two documents for the twin myths and is not going to assert that the complainant is more likely to have consented or less worthy of belief as a result of authoring and providing these documents to the accused. The accused has identified a use of the proposed evidence that does not invoke twin-myth reasoning. He seeks to use the documents to challenge the credibility and reliability of the complainant. Credibility will be a key issue at trial. The two documents suggest that the complainant told the police something different than the documents indicate as to her relationship with the accused. The documents appear to be relevant to the complaint's credibility. The use of the documents for that purpose would be important to the ability of the accused to make full answer and defence. The documents are also specific documents containing specific details.

45 For these reasons, the application should proceed to a stage two hearing under s. 276. A full analysis of the factors under ss. 276(2) and (3) and a determination of whether the documents are admissible will be conducted at the stage two hearing.

Section 278.1 - Private Records Application - Records in the Possession of the Accused

46 Even if the documents were not subject to s. 276, I would find that they are capable of admission under s. 278.92 and would direct that the application proceed to a stage two hearing.

Complainant's Participation at Stage Two

47 When the Crown receives the application prior to the stage one inquiry, it should provide a general description of the nature of the record and of its relevance to an issue at trial to the complainant and/or the complainant's counsel: *J.J.*, at para. 92. However, the presiding judge retains the discretion to direct that the application not be disclosed to the complainant or that portions of it be redacted. This may arise based on a party's or the judge's own concerns about the impact of disclosure on trial fairness: *J.J.*, at para. 96. No issues were raised by the accused in this regard.

48 The complainant must be advised of her right to appear at stage two, make submissions, and be represented by counsel. The Crown is to so advise the complainant. If the Crown has not already done so, it is to disclose the contents of the application to the complainant and/or the complainant's counsel to prepare for the stage two hearing.

49 The parties have agreed that these reasons may be released in writing and entered into the record at the next appearance. The parties may submit a consent chambers (basket) motion for my consideration for the appointment of counsel for the complainant.

50 The Crown Attorney shall ensure that counsel for the complainant and the complainant are provided a copy of this ruling forthwith.

51 Pursuant to s. 278.95, no one shall publish the determination made herein and the reasons provided on the application, unless that determination is that the evidence is admissible after stage two, or pursuant to a court order made under s. 278.95(d)(ii).

M. BORDIN J.