R. v. A.S.

Ontario Judgments

Ontario Superior Court of Justice

M. Bordin J.

Heard: June 17, 2024.

Judgment: July 8, 2024.

Court File No. CR-23-00000018-0000

[2024] O.J. No. 4786 | 2024 ONSC 3662

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

(66 paras.)

Counsel

Fraser McCracken, counsel for the Crown.

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David Butt, counsel for the Complainant.

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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Code*, information that may identify the persons described in this judgment as the complainant and the accused may not be published, broadcasted, or transmitted in any manner.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 TWO OF SECTION 278.92 APPLICATION

M. BORDIN J.

Overview of the Application

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. On June 4, 2024, I released to the parties my reasons on stage one of the application. I held that the documents are evidence captured by s. 276 of the *Criminal Code*. I found that, given their context and content, the documents are communications containing content of a sexual nature and are subject to s. 276.

4 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 found that the documents were evidence capable of being admitted and ordered that the application proceed to a stage two hearing under s. 276 where a full analysis of the factors under ss. 276(2) and (3) and a determination of whether the documents are admissible would be conducted.

5 The stage two hearing was heard before me on June 17, 2024. The complainant filed a factum and made submissions.

Background and Nature of the Evidence Sought to be Adduced

6 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.

7 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.

8 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.

9 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.

10 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.

11 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.

12 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.

13 In her statement to Detective Narancsik dated June 17, 2022, A.L. told the police:

> 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."

15 The Crown and accused have tendered an agreed statement of fact that the complainant's DNA and the accused's semen was located on the front waistband of the complainant's underwear.

Position of the Parties

16 The accused submits the documents are relevant to credibility and reliability of the complainant and contradict her statements to the police. The accused asserts that the complainant's statement to the police was not truthful and seeks to use the documents to cross-examine the complainant. The accused argues that the complainant appeared to lie to the police about the nature of her relationship. As the only witnesses to the events in issue are the complainant and the accused, the accused submits that cross-examination on the documents is required to make full answer and defence.

17 In submissions, and in his factum, the accused continually referred to the documents being relevant to the nature of the relationship between the applicant and the complainant. In submissions, the complainant conceded that there is no evidence of a relationship between the parties and that the relevance of the documents is that they are inconsistent with what the complainant told the police about her interest in the accused.

18 The nature of the defence being put forward by the accused was not specifically proffered. I am left to infer from the accused's application and submissions and the agreed statement of facts that the defence is that the complainant consented.

19 The Crown accepts that the documents are not being adduced principally to support the twin myths. The Crown does not assert that the documents do not satisfy s. 276(2)(c) and concedes that they are specific instances of communications of a sexual nature. However, the Crown asserts that the documents are not inconsistent statements, are not relevant to an issue at trial, are not relevant to determining whether the complainant consented to sexual intercourse, do not have significant probative value, and any probative value is substantially outweighed by the danger of prejudice to the proper administration of justice. The Crown submits that the documents will distract from the core issues and carry a substantial risk of prejudice that they may be used to engage in prohibited twin myths reasoning - particularly in a jury trial. The Crown points to the youth of the complainant and the power imbalance between the complainant and her coworker, the accused.

20 The complainant adopted the Crown's position but conceded that some aspects of the complainant's statement to the police could be characterized as inconsistent and could have some utility in assessing credibility. The complainant refers to the inconsistencies as "minor". The complainant emphasized the nuanced and sometimes contradictory expressions of adolescent sexuality. The complainant emphasizes the danger of prejudice of twin myth reasoning but concedes that the trier of fact can be specifically instructed on the law of consent and to avoid twin myth reasoning with an appropriate charge to the jury. The complainant submits that if the documents are admitted that questioning be tightly constrained and go no further than required to establish the inconsistency sought by the accused.

A Stage Two Hearing

21 The Supreme Court in *R. v. J.J.*, 2022 SCC 28, at paragraphs 30-33, set out the following procedure for a stage two hearing:

> [30] At the Stage Two hearing, the presiding judge decides whether the proposed evidence meets the tests for admissibility set out in s. 278.92(2).
>
> [31] For s. 276 evidence applications, the governing conditions are set out in s. 276(2), as directed by s. 278.92(2)(a). This determination is made in accordance with the factors listed in s. 276(3).
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> [33] Complainants are permitted to appear at the Stage Two hearing and make submissions, with the assistance of counsel, if they so choose (s. 278.94(2) and (3)).

Section 278.92(2)(a)

22 Pursuant to s. 278.92(2)(a), if the admissibility of the evidence is subject to section 276, the evidence sought to be adduced by the accused is inadmissible unless I determine, in accordance with the procedures set out in ss. 278.93 and 278.94 that the evidence meets the conditions set out in subsection 276(2) while taking into account the factors set out in subsection (3).

23 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: *J.J.*, at para. 139.

Section 276

24 Pursuant to s.276(1) of the *Criminal Code*, evidence that the complainant has engaged in sexual activity is not admissible to support an inference that, by reason of the sexual activity, the complainant (a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or (b) is less worthy of belief.

25 As a result of section 276(4), sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.

26 Sections 272 (2) and (3) state:

> (2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94, that the evidence
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> (a) is not being adduced for the purpose of supporting an inference described in subsection (1);
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> (b) is relevant to an issue at trial; and
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> (c) is of specific instances of sexual activity; and
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> (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
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> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account:
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> (a) the interests of justice, including the right of the accused to make a full answer and defence;
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> (b) society's interest in encouraging the reporting of sexual assault offences;
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> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
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> (d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

276(2)(a) Twin Myths

27 The majority *R. v Goldfinch*, 2019 SCC 38, at para 56, explained that bare assertions that evidence will be relevant to context, narrative or credibility cannot satisfy s. 276(2). A s. 276 application must provide "detailed particulars" which will allow a judge to meaningfully engage with the tests set out at s. 276(2) and (3). The accused must propose a use of the evidence that does not invoke twin-myth reasoning. These requirements are key to preserving the integrity of the trial by ensuring twin-myth reasoning masquerading as "context" or "narrative" does not ambush the proceedings: *Goldfinch*, at para. 51.

28 The accused submits that he is not seeking to adduce the two documents for the twin myths and will not assert that the complainant is more likely to have consented or is less worthy of belief because of authoring and providing the documents to the accused. He asserts the two documents are inconsistent with what the complainant told the police about her interest in a relationship with the accused. The accused seeks to use the documents to challenge the credibility and reliability of the complainant. The accused has identified a use of the documents that is not directed to invoking twin-myth reasoning. This was not vigorously opposed by the Crown or the complainant.

276(2)(b) Relevance

29 The question of the complainant's propensity, or lack thereof, to engage in sexual intercourse can have no bearing in determining whether she consented to the sexual activity on the night in question. Contemporaneous, affirmatively communicated consent must be given for each and every sexual act: *Goldfinch*, at para. 44. Similarly, the complainant's romantic interest in the accused is not relevant to the issue of consent. The documents are simply not relevant to whether the complainant consented.

30 I acknowledge that generic references to the credibility of the complainant will not suffice. Credibility is an issue that pervades most trials, and evidence of prior sexual activity will rarely be relevant to establish consent: *Goldfinch*, at para. 56.

31 The Supreme Court, at para. 30 of *Goldfinch*, explains that the law of criminal evidence begins with the general principle that all relevant and material evidence is admissible but that this

is not without limits. The right to a fair trial does not, however, guarantee the most favourable procedures imaginable: the accused's right to make full answer and defence is not automatically breached whenever relevant evidence is excluded (*R. v. Quesnelle*, 2014 SCC 46, [2014] 2 S.C.R. 390, at para. 64; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 24; *R. v. Mills*, 1999 CanLII 637 (SCC), [1999] 3 SCR 668, at para. 75). Further, a fair trial also requires that no party be allowed to distort the process by producing irrelevant or prejudicial evidence (*Darrach*, at para. 24).

32 Relevance is fact-specific. It depends on the material facts in issue, the evidence adduced, and the positions of the parties: *R. v. L.S.*, 2017 ONCA 685, at para. 86. Evidence does not have to establish or refute a fact in issue to be relevant; it need only, as a matter of common sense and human experience, have some tendency to make the existence or non-existence of that material fact more or less likely: *L.S.* at para. 89.

33 At para. 63 the majority in *Goldfinch* noted that evidence of a sexual relationship may also be relevant when a complainant has offered inconsistent statements regarding the very existence of a sexual relationship with the accused (see, e.g., *R. v. Harris* (1997), 1997 CanLII 6317 (ON CA), 118 C.C.C. (3d) 498 (Ont. C.A.); *R. v. Temertzoglou* (2002), 2002 CanLII 2852 (ON SC), 11 C.R. (6th) 179 (Ont. S.C.J.)). The Supreme Court noted that there were no contradictory statements from the complainant in *Goldfinch* in the record at the time of the *voir dire*.

34 *Harris*, *Temertzoglou*, and *R. v. Crosby*, [1995] 2 S.C.R. 912, were considered by the Supreme Court in the recent decision of *R. v. T.W.W.*, 2024 SCC 19:

> [29] The appellant raised three cases where prior sexual activity evidence was admitted to challenge a complainant's credibility or to provide necessary context. Each is illustrative of the instructions in *Goldfinch* on the proper use of prior sexual activity evidence for context or challenging credibility.
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> [30] The first case the appellant raises is *R. v. Crosby*, [1995] 2 S.C.R. 912, where the complainant told police that she had visited the accused with the intention of having sex; however, at the preliminary inquiry she testified that she did not intend to have sex with the accused when she visited him. The trial judge excluded the complainant's statement to the police under s. 276. When the complainant testified again on cross-examination that she did not intend to have sex with the accused when she visited him, the earlier ruling barred defence counsel from challenging this testimony as inconsistent with her statement to police.
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> [31] Justice L'Heureux-Dubé, writing for a majority of this Court, held that the trial judge erred in excluding the evidence because the starkly opposing versions of events testified to by the complainant and the accused placed credibility as the central issue at trial, and the complainant's statements presented a material inconsistency. Balancing the evidence's probative value against its prejudicial effect, the interests of justice favoured admitting the evidence.

> [32] Justice L'Heureux-Dubé's comments were cited two years later in *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.). The accused and the complainant met at a bar several days before the alleged assault. The complainant testified in chief that her relationship with the appellant was platonic, that they had not engaged in any sexual activity, and that she told him she did not want a sexual relationship. The accused sought to adduce evidence of an alleged consensual sexual encounter several days before the sexual assault.
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> [33] Justice Moldaver held that the prior sexual activity evidence was necessary to the appellant's ability to make full answer and defence because it could rebut the complainant's claim that their relationship was strictly platonic. Justice Moldaver succinctly summarized the implications of the exclusion of this evidence:
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> > By failing to permit the appellant to lead evidence of the Tuesday night incident, the jury was deprived of the tools needed to fully and fairly assess the conduct of the parties and the believability of their respective positions. Left unchallenged, the complainant's testimony concerning her relationship with the appellant was potentially devastating to his position. [para. 49]
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> [34] *R. v. Temertzoglou* (2002), 11 C.R. (6th) 179 (Ont. S.C.J.), is another case where prior sexual activity evidence was admitted for credibility and context. The complainant had made inconsistent statements about whether her relationship with the accused was sexual, and the evidence was essential to the defence's ability to make full answer and defence by challenging the complainant's credibility.
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> [35] Read in light of the current statutory regime and the jurisprudence since these cases were decided, these decisions serve as examples of when evidence of other sexual activity evidence may be relevant to credibility where the complainant makes inconsistent statements about the very existence of a sexual relationship, or where the evidence goes to the fundamental coherence of the defence narrative (*Goldfinch*, at paras. 63 and 65-66). The admission of the evidence in each of these cases was held to be necessary to the ability of the accused to make full answer and defence.

35 The Crown submits that there is no inconsistency between the statement of the complainant to the police and the two documents when one reviews the other statements made by the complainant to the police and the documents themselves. Alternatively, the Crown submits the statement is equivocal when read in context. The Crown points to portions of the complainant's statement to the police where she indicates there was flirting and nothing sexual between them, although some semi-nude photos were exchanged, and statements made by the complainant that there was joking and flirting in the workplace.

36 In response to the officer asking her whether she thought that her interaction with the accused could maybe "be something", the complainant responded that she did not want a romantic relationship and that she just wanted a friendship. In my view, the statements by the complainant to the officer make clear that her position to the police was that she only wanted a friendship with

the accused which is inconsistent with the tenor and the expressions of love and romantic interest in the two documents.

37 The Crown also submits that the documents are consistent with the complainant's statement to the police regarding the joking and flirting that occurred at the place of work. The Crown says the two documents are joking in nature, at least in part. While some of the comments in the documents could be characterized as joking, the documents are of a different nature from the flirting and joking described by the complainant in her statement. The documents clearly express desire, romantic interest, and the complainant's "love" for the accused.

38 The Crown submits that the three cases referenced in *T.W.W.* can be distinguished because the cases concerned inconsistencies about the nature of the sexual relationship between the parties relevant to the alleged offences. The Crown submits that the alleged inconsistency put forward by the accused, at best, relates to whether she had a romantic interest in the accused.

39 While there is some merit to the assertion that in some cases the inconsistency relates to the very existence of a sexual relationship between the parties, O'Bonsawin J. in *T.W.W.*, at para. 39 distinguished *Harris* and *Temertzoglou*"where the nature and origin of the relationships were central to the inconsistencies in the complainant's testimonies that formed the basis for admitting the evidence." O'Bonsawin J. noted that "there was no inconsistency in the complainant's testimony and therefore no risk that the trial judge would not understand the nature of their relationship."

40 In *Temertzoglou*, the evidence sought to be tendered concerned interactions between the complainant and the accused and went beyond a mere inconsistency in the complainant's evidence. At para. 31, Fuerst J. held:

> Specifically, the evidence of other sexual activity has relevance in that it shows the development of a relationship between the parties which is more than platonic, notwithstanding an age difference that might otherwise engender a presumption against the defence; it provides necessary context to the motel visit on November 24, without which aspects of Mr. Temertzoglou's account such as the obtaining of lambskin condoms would be untenable; it is necessary in order to make sense of prior inconsistent statements that will be put to Ms. M.-E.C., which can impact on her credibility; and it demonstrates the complainant's involvement in planning the evening of November 24, which tends to support the defence position.

41 In my view, the admissibility of inconsistent statements which are subject to section 276 is not limited to the narrow situation suggested by the Crown.

42 The documents contain statements that are sufficiently inconsistent with the complainant's statement to the police. The documents, should they be accepted by the trier of fact as inconsistent with the police statement, can undermine the complainant's credibility such that they could

possibly make the allegation that the complainant did not consent less likely to be true, even if there are other possible explanations for the documents. The documents are, therefore, relevant.

276(2)(c) Specific Instances

43 That the documents constitute specific instances of communications of a sexual nature is not disputed.

276(2)(d) Significant Probative Value Must not be Substantially Outweighed by the Danger of Prejudice to the Proper Administration of Justice

44 The Supreme Court in *Darrach,* at para. 41 held that:

> The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still endanger the "proper administration of justice". The Court has recognized that there are inherent "damages and disadvantages presented by the admission of such evidence" (*Seaboyer*, *supra*, at p. 634). As Morden A.C.J.O. puts it, evidence of sexual activity must be significantly probative if it is to overcome its prejudicial effect.

45 Section 276(3) requires the court to consider and weigh a non-exhaustive list of factors in balancing the probative value of evidence against its potentially prejudicial effect: *R. v. R.V.*, 2019 SCC 41, at para. 45; *R. v. B.J.*, 2022 ONSC 6438, [2022] O.J. No. 5021, at para. 26.

46 The Court of appeal for Ontario in *R. v. M.T.*, 2012 ONCA 511, at para. 43, explained the significance of the words chosen by Parliament:

> Section 276(2)(c), involves a balancing of probative value and prejudicial effect. But the balance is calibrated differently than we see in the general exclusionary discretion or the more circumscribed discretion to exclude otherwise admissible defence evidence. The addition of the terms "significant", as descriptive of the probative value, and "substantially", as the extent to which significant probative value must predominate over "prejudice to the proper administration of justice", appears to require a more nuanced or qualitative assessment of the competing interests. These interests are incommensurables. Probative value has to do with the capacity of the evidence to establish the fact of which it is offered in proof. Prejudicial effect relates to trial fairness.

47 The Court in *T.W.W.*, at paras. 27 and 28 cautioned trial judges:

> [27] In order to be potentially admissible, the relevance and probative value of the evidence in each case must go beyond a general ability to undermine the complainant's credibility ... it must respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence.
>
> [28] Trial judges must guard against improperly widening the scope of when other sexual activity evidence should be admitted given that, as Karakatsanis J. noted in *Goldfinch*, "credibility is an issue that pervades most trials" (para. 56)... Too broad an approach to credibility ... would cast open the doors of admissibility, overturning Parliament's specific

> intention and this Court's longstanding jurisprudence that evidence of other sexual activity will be admitted only in cases where it is sufficiently specific and essential to the interests of justice. Given the specific thresholds set by Parliament and their underlying objectives, something more is required to show that admission is justified. The accused must demonstrate with particularity not only that credibility ... is relevant to an issue at trial but that, in the absence of the evidence, their position would be "untenable" or "utterly improbable."

48 The Crown submits that the equivocal nature of what is meant by romantic interest and the tenuous nature of the inconsistency results in the documents having very limited probative value, if any.

49 The complainant, who worked with the accused but otherwise apparently did not have a relationship with him, wrote and provided to the accused the two documents. The jury could find that the documents are inconsistent with the complainant's statement to the police. If the jury so concludes, the jury could find that this undermines the complainant's credibility calling into question her evidence which could give rise to a reasonable doubt.

50 Therefore, whether the complainant was not truthful in her statement to the police is significantly probative of her credibility, which is particularly important in a case such as this where credibility of the complainant will be key to establishing lack of consent. The documents also provide relevant context to the events at issue.

51 The fact that there may be other explanations or uncertainty of the answers to questions about the documents does not deprive the documents of their probative value: *R.V.*, at para. 62; *B.J.*, at para 19.

52 The complainant raised concerns with the impact on reporting of offences that could result from the admissibility of her thoughts expressed in the documents. There is no doubt about society's interest in encouraging the reporting of sexual assault offences or that even "relatively benign" relationship evidence must be scrutinized and handled with care: *Goldfinch*, at para. 46.

53 Being questioned on documents written when the complainant was 16 years old which contain her deeply personal musings and feelings, will impact the complainant's personal dignity and right to privacy. However, the contents of the documents are not as serious and affronting to the complainant's personal dignity as are the details of what occurred in the alleged sexual assault. Further, the documents were created to be given to the accused and were in fact given to him, attenuating somewhat the impact on the complainant's privacy.

54 The Crown submits that there is a substantial risk that the admission of the documents will lead to the prohibited twin myths being invoked by the triers of fact. Such a risk certainly exists. The need to remove from the fact-finding process discriminatory belief or bias is always a focus.

55 However, there is often a risk that jurors will misuse evidence. The risk can be high when the accused is charged with sexual assault and the evidence in issue relates to other sexual activity. But as noted by the Court of Appeal for Ontario in *L.S.* at paras 95 and 96, the risk of juror misuse of evidence of other sexual activity is taken into account by the scheme established under s. 276. Section 278.96 requires that when a trial judge admits evidence of other sexual activity, the judge must "instruct the jury as to the uses that the jury may and may not make of the evidence". The jury can be instructed on the permitted and the inappropriate uses of the evidence.

56 The Crown submits that admitting the documents will lead to the trial being derailed to pursue the issue of what type of relationship the complainant was subjectively interested in having with the accused which does not assist in determining the issues at trial and whether she consented to sexual intercourse. There is some risk of this. However, that risk can be attenuated if questioning is directed only to the inconsistency between the documents and the police statement and trial evidence.

57 There is also a risk that the documents will arouse sentiments of sympathy or hostility in the jury. There is a risk that this could negatively affect the accused as well as the complainant. The accused is prepared to take this risk.

58 Balancing the s. 276(3) factors ultimately depends on the nature of the evidence being adduced and the factual matrix of the case. It will depend, in part, on how important the evidence is to the accused's right to make full answer and defence. For example, the relative value of sexual history evidence will be significantly reduced if the accused can advance a particular theory without referring to that history. In contrast, where that evidence directly implicates the accused's ability to raise a reasonable doubt, the evidence is obviously fundamental to full answer and defence: *Goldfinch*, at para. 69.

59 As stated in *R.V.*, at para. 64:

> ... the more important evidence is to the defence, the more weight must be given to the rights of the accused. For example, the need to resort to questions about a complainant's sexual history will be significantly reduced if the accused can advance a particular theory without referring to the complainant's sexual history. But in other circumstances -- where challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt -- cross-examination becomes fundamental to the accused's ability to make full answer and defence and must be allowed in some form: *Mills*, at paras. 71 and 94.

60 In the circumstances of this case, the ability to establish that the complainant may not have been truthful with the police on an important issue is essential to the right of the accused to make full answer and defence. The Crown and complainant did not suggest establishing such an inconsistency would not be important to the defence. There is no evidence before me to suggest

that there is other evidence that the accused could enlist to advance his theory without pursuing this apparent inconsistency.

61 In my view, such evidence and questioning of the complainant with respect to the possible inconsistency will assist in arriving at a just determination of the case and the interests of justice are better served by allowing the admission of the documents and limited cross-examination.

62 In balancing these factors, I find that the documents, used to cross-examine the complainant on an inconsistent statement to the police or at trial, is of significant probative value and is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Conclusion

63 For the foregoing reasons, the application is allowed. The accused will be permitted to cross-examine the complainant on the documents for the limited purpose of establishing any inconsistency.

64 The Supreme Court made clear that the court must carefully circumscribe the scope of the proposed cross-examination. "The trial judge must therefore narrow the scope of the questioning to minimize the impact on the complainant, while maintaining the accused's ability to answer the charges": *R.V.*, at para. 67.

65 Therefore, I direct that at the outset of trial and in advance of the cross-examination of the complainant the defence tender a draft of proposed cross-examination questions regarding the documents for the court's review: see *R.V.*, at para. 73. Submissions on this issue may be made at the outset of trial.

66 The parties have agreed that these reasons may be released in writing.

M. BORDIN J.

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