Date: 19990806
Docket: CAC151954

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Power, 1999 NSCA 166
Chipman, Pugsley and Cromwell, JJ.A.

BETWEEN:

ANDREW MICHAEL POWER	)	Joel Pink, Q.C. and
	)	Deirdre R. Murphy
	)	for the appellant
Appellant	)	
	)	
- and -	)	
	)	
HER MAJESTY THE QUEEN	)	Denise Smith
	)	for the respondent
Respondent	)	
	)	
	)	
	)	Appeal Heard:
	)	April 1, 1999
	)	
	)	Judgment Delivered:
	)	August 6, 1999
	)	
	)	

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal dismissed per reasons for judgment of Pugsley, J.A.; Chipman and Cromwell, JJ.A. concurring.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4),
>
> where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Pugsley, J.A.:

Overview

[1] The issue in this appeal is whether Justice LeBlanc, of the Supreme Court, in the course of the trial of the appellant, Andrew Power, on a charge of sexual assault, erred in law in excluding evidence of prior sexual consensual activity between Mr. Power, and the female complainant.

[2] The appellant was charged in an Information sworn on February 5, 1997, containing two counts, that contrary to s. 271 of the **Criminal Code**, R.S.C. 1985, Chap. c-46, he sexually assaulted

- the complainant on January 26, 1997, and
- another female student (hereinafter referred to as A.A.) on September 27, 1996.

[3] The appellant was tried by a jury between October 18 to 24, 1998, at Antigonish. After the jury had deliberated in excess of one day, he was convicted on the first count, but acquitted on the second.

[4] The subject matter of each count concerned the events of early morning encounters with each of the complainants. The appellant's counsel applied, pursuant to s. 276 of the **Code**, to cross-examine each of the complainants respecting a prior incident of sexual activity that he alleged each separately experienced with him. The sexual activity with A.A., which did not involve full intercourse, occurred in early

September, 1996, at approximately 2:00 a.m. in a motor vehicle after a meeting in a * in Antigonish. The sexual activity with the complainant occurred shortly before Christmas, 1996, at the complainant's apartment.

[5] In the case of A.A., Justice LeBlanc ruled the evidence of the prior sexual activity admissible. In the case of the complainant, the evidence of the prior sexual activity was determined to be inadmissible as:

(1) it was not relevant to an issue at trial, the issue being honest but mistaken belief in consent, as the prior sexual activity was not “sufficiently proximate” in time; and

(2) it did not have significant probative value to the defence and “may prejudice the complainant and the proper administration of justice”.

(3) Justice LeBlanc further ruled that Mr. Power would have an opportunity to make full answer and defence by permitting his counsel to question the complainant, a prospective witness, and Mr. Power, if called, respecting a conversation between the complainant and Mr. Power related to the previous sexual encounter.

[6] Mr. Power appeals his conviction on the grounds that the trial judge erred when he:

- refused to permit evidence at trial pertaining to previous sexual activity in which the complainant allegedly engaged with him;
- in misdirecting himself in connection with "the defence of honest but mistaken belief as it applies in the context of an application under s. 276 of the **Code"**;

- in misdirecting himself in respect to the interpretation and application of s. 276 of the **Code**.

[7] The issues raised in this appeal, respecting the relevance, and probative value of the previous encounter, are more easily understood with an appreciation of the progress of the proceedings and the evidence considered on the application.

Pre-trial and Trial Proceedings

[8] Section 276.1 of the **Code** outlines the form and content of the application, as well as the discretion granted to the Court to hold a hearing to determine whether the evidence requested is admissible.

[9] It reads:

> 276.1. (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 made in writing and set out
>
> (a) detailed particulars of the evidence that the accused seeks to adduce, and
> (b) the relevance of that evidence to an issue at trial,
>
> and a copy of the application must be given to the prosecutor and to the clerk of the court.
>
> (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
>
> (4) Where the judge, provincial court judge or justice is satisfied
>
> (a) that the application was made in accordance with subsection (2),
> (b) that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or such shorter interval as the judge, provincial court judge or justice may allow where the interests of justice so require, and
> (c) 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 276.2 to determine whether the evidence is admissible under subsection 276(2).

[10] Crown counsel acknowledged that the appellant had met all of the prerequisites stipulated in s. 276.1(2), as two months prior to trial a written notice of application was filed and served, wherein the appellant sought leave to introduce evidence that:

> Upon minimal acquaintance, [the complainant] was desirous of engaging in intimate sexual relations with [Mr. Power] and this desire continued to be expressed and pursued by [the complainant] at the time of the alleged offence.

[11] A similar notice was filed on behalf of the appellant respecting previous consensual sexual activity with A.A.

[12] After arraignment and plea, but before the calling of evidence, counsel for the appellant made the s. 276 application, noting that:

> . . .normally would be made during the course of the trial primarily for your Lordship to have heard the evidence of the two complainants . . .,

but counsel were in agreement that Justice LeBlanc should read the evidence of the two complainants given at the preliminary inquiry.

[13] The appellant, being called by his counsel on the *voir dire*, testified in chief, respecting his previous meeting with the complainant.

[14] I summarize his evidence as follows:

– In the fall of 1996, when he was a student at St. Francis Xavier University, in Antigonish, one of his friends asked the complainant, a student as well, if she could give him a ride home as he was not feeling well. She complied;

– The appellant next came in contact with the complainant in December at about 10:30 p.m. at the * in Antigonish. Both had gone with their respective friends. They talked over a couple of drinks at the bar and then at the end of the night (approximately 2:00 a.m.) she asked him to slow dance "like, arm in arm";

- He testified:

> ... we decided that I would walk her home and we went outside the bar and we started walking home and we were holding hands and kissing each other. . . we talked about where I was going to go and where she was going to go. I told her that I was going to go home. I would invite her over but my landlady was at home sleeping, so it wouldn't be a good idea . . . I said, well, is anybody at your house, or - and she said, "Well, I live by myself and my roommate, so we can go there and my roommate will be sleeping"... She didn't seem to be drunk . . . . She opened the door and we went inside and her roommate was sleeping on the couch so she told me to take my shoes off and follow her. So she led me by her hand and we went into her bedroom and she lay down on the bed in her bedroom and then I lay down beside her.

- The appellant and the complainant engaged for about twenty minutes in increasingly intimate sexual activity leading to full sexual intercourse. He left her apartment at approximately 3:30 a.m.;

- A subsequent encounter at the university before Christmas simply resulted in an exchange of "greetings";

- The appellant then went home to Ontario for the Christmas holidays, returning to Antigonish the first week in January. He did not date or see the complainant before the 26th of January.

[15] Crown counsel declined to cross-examine, apparently influenced by the decision in **R. v. Mohamed** (1993), 85 C.C.C. (3d) 182 (Ont. Gen. Div.), which counsel submitted:

> ...seems to stand for the proposition that the Crown, or at least in that case, the Crown was denied the opportunity to cross-examine entirely at this stage of the game.

In the later case of **R. v. Darrach** (1998), 122 C.C.C. (3d) 225 (Ont. C.A.), Morden, A.C.J.O., on behalf of the Court, concluded that if the accused was to be called on the *voir dire* then cross-examination should be permitted, but confined, “to what is necessary to ... determine whether the proposed evidence is admissible under s. 276(2)” (p.248).

[16] Counsel for Mr. Power directed the Court’s attention to **R. v. Seaboyer**, [1991] 2 S.C.R. 577; **R. v. Mohamed**, **supra**; **R. v. Harris** (1997), 118 C.C.C. (3d) 498, (Ont. CA.); **R. v. Ecker** (1995), 96 C.C.C.(3d) 161 (Sask. C.A.) and stressed that:

> Primarily, that there was, first of all there was consent and, number two, that there was an honest but mistaken belief in that consent.

[17] Crown counsel opposed the introduction of evidence respecting the December incident, and submitted that the relevance of the specific instance of sexual activity, which was implicitly acknowledged, depended upon:

> ...whether the defence of honest but mistaken belief is one which could appropriately be left with the jury.

[18] He stated:

> I expect that the evidence of the complainant and the evidence of the accused, with respect to the events leading up to the alleged assault may be very similar. But with respect to the events which really count, which is the actual assault, there is going to be a difference. There has to be if, indeed, the complainant's evidence is the same as it is at preliminary, which is to the effect that [she] protested and clearly did not give [her] consent and made [her] lack of consent known . . . If his evidence is that there was consent and there was no problem with the sexual contact, then I would submit that the stories are diametrically opposed and it is simply an issue of credibility . . . The prior events appear to have been consensual. There appears to have been no protest from the complainant on the prior events. But on the [event] in question, which forms the subject matter of the charge, there was.

[19] Counsel for the appellant, with the agreement of the Crown, then asked the Court to reserve making a decision on the applications until after the Court had heard the evidence of both complainants.

[20] A.A., called by the Crown, was examined and cross-examined before the jury with respect to the sexual encounter of September 27,1996. After submissions by counsel, in the absence of the jury, Justice LeBlanc granted the s. 276 application with respect to the prior incident of sexual activity between the appellant and A.A. that occurred in early September. A.A. then returned to the stand and was cross-examined respecting the prior incident.

[21] The complainant was then called, in the presence of the jury, and testified in chief, that:

- Presently twenty-two years of age, she was a senior at St. F.X., anticipating to graduate with an * (*editorial note- removed to protect identity*) at the end of the university school year;
- On Saturday, January 26th, after a telephone call about 9 p.m. initiated by Mr. Power, and three or four subsequent phone calls, she went to the * with friends at about 12:30 a.m. After staying for a short while she asked her female friend to drive her to the appellant's apartment. She knocked on the door but there was no answer. She then knocked on the window, and after speaking to an occupant, one Michael Trenholm, she returned to her apartment. A few minutes later the appellant phoned, and after discussion, it was agreed that he would come down to pick her up. They returned to his basement apartment, went into the den, and after a few moments' conversation, they engaged in kissing, and he removed her shirt and bra. As she was uncomfortable without a shirt on, and he had removed his sweatshirt, she put it on. He placed blankets on the floor and after kissing:

> We again were kissing and I told him that I wanted things to go slow. I told him that I wanted to talk. I would like to get to know him better. He had told me that he wanted to make it with me. I had told him that I didn't want to do anything that evening. That I was just there to talk to him and to get to know him. Shortly after we got to the floor, I went to the washroom, to use the washroom. I returned and I again sat on the floor and I was sitting up and Andrew asked me if I would lay down and I did. I remember at one point pushing him off me, telling him to slow down, that I didn't want to do anything . . . He was beside me laying. I was laying down. He was on top of me and he went off to the side of me, which would have been my right side. . . . He kept repeating all night that he "wanted to get his load off" ... I kept telling him that I didn't want to do anything. He never acknowledged ... But I was persistent. I kept telling him that I didn't want to do anything. I just wanted to talk. I asked him to slow down . . . He had got back on top of me and told me that the jeans - my buttons on my jeans that I had on, those buttons were hurting him. I said it wasn't my problem. I wasn't - I told him I wasn't removing my

> jeans. He proceeded to unbutton them. I again told him I didn't want my jeans to come off. He pulled them off. I am not a very big person and the jeans just slid right off me. . . .He was kneeling at my feet and he pulled them and they came right off. And I told him again that I didn't want to do anything. . . . He got back on top of me and I remember he was pressing against me so hard that I couldn't even breathe. ... I told him that he was hurting me and I couldn't breathe. He kneeled up and removed - pulled off my underwear. I told him I didn't want to do anything. He was persistent. He didn't care what I was saying. . . . I remember pulling away from him. I remember inching my way off the blanket and he pulled me back onto the blanket. He even grabbed the pillow and told me I would be more comfortable with the pillow under my head. I told him again I didn't want to do anything. . . . He got back on top of me and he penetrated me with his penis and I immediately told him to stop. And I kept asking him to stop. That I didn't want to do this. And I just kept repeating over and over to please stop.
>
> Q. What was he saying to you while you were saying this?
>
> A. That it would just be another minute. That he "wanted to get his load off" . . . This lasted for just a couple of minutes . . . and he ejaculated on my stomach. He didn't realize I was on my period. . . . He asked why I didn't tell him and I had said that I'd been telling him no for the last number of minutes, the whole duration, and he just got up and nonchalantly remarked, "I never heard you say no";

- She was crying and upset. He drove her home, but as she had left her keys in the appellant's' apartment, she phoned a friend to drive her back so she could pick up her keys. She retrieved her keys from him, saying nothing.

[22] After a short cross-examination, the jury was excused, and counsel for the appellant renewed the s. 276 application.

[23] Counsel advised that he had planned to call Mr. Trenholm to give *viva voce* evidence. As he was not conveniently available, he introduced a statement which counsel advised was a summary of a telephone conversation he had the previous evening with Mr. Trenholm.

[24] Crown counsel consented to the introduction of the statement, subject to the qualification:

> We are not admitting the truth of those statements, merely that that is an accurate reflection of what Mr. Trenholm's statement was and presumably what his evidence might be.

[25] The statement reads as follows:

1. Michael Francis Trenholm on January 26, 1997, lived at 5 Cunningham Drive, Antigonish, Nova Scotia;

2. His bedroom was located in the basement of 5 Cunningham Drive;

3. Also living at 5 Cunningham Drive was Andrew Power;

4. During the early morning hours of January 26, 1997, Andrew Power invited [the complainant] over to their residence;

5. During the early morning hours [the complainant] came to the residence and at Andrew's instructions, I sent her away;

6. After she left, Andrew made another call to [the complainant] and on this occasion she came to the residence and Andrew Michael Power and [the complainant] went to the recreation room;

7. When Andrew Power and [the complainant] were sitting on the couch in the recreation room I was in my bedroom which is located not far from where they were sitting;

8. While [the complainant] and Andrew Power were sitting on the couch I left my bedroom to go to the washroom;

9. At this time I looked into the recreation room and saw Andrew Power and [the complainant] on the couch kissing and making out;

10. I heard him ask her to go on the floor and thereafter I was listening to their conversation;

11. I heard [the complainant] saying "We shouldn't do this". Andrew replied "Why not we did it before?" [The complainant] replied, "Yes, I know but I don't think we should tonight". To which Andrew replied, "Why, didn't you like it last time we did?" [The complainant] replied, "Yeah, but this is different." Andrew replied, "Let me put it in and if you don't like it I'll stop.";

12. At no time did I ever hear her say, "No, don't do this." At no time were voices ever raised;

13. When they were having sex I saw Andrew holding himself up by his hands;

14. At no time did I see [the complainant] visibly upset.

[26] The application was based on the following grounds:

> Number one being, of course, consent . . . and the second one is honest but mistaken belief. You see, another difficulty that we have with this particular case is that there is going to be evidence that in fact my client said to her, "But we've done it before". You know, that is going to have to come out, regardless of what the ruling is because that is a part, in fact, of what's happened. I mean that in fact was conversation that he had with the complainant at the time.

[27] Counsel for the Crown submitted that the evidence of the complainant, and the evidence of the appellant, was in conflict at the time of encounter and accordingly there was no "air of reality" attaching to the submission.

[28] With respect to the initial inquiry under s. 276.1(4), Justice LeBlanc determined:

> I am reluctant to arbitrarily decide the issue on the first ground; namely, and I am going to therefore, for the moment, take the position that there is sufficient evidence to go to the second stage hearing.

[29] Such a determination was in accord with the comments of Justice Cameron, speaking for the majority, in **R. v. Ecker**, **supra**, where he stated at p. 181:

> As for the first of these determinations, it would seem to me that such doubts as might exist at this stage are better left to be resolved at the next or hearing stage. I say that for the reason the first stage entails only a facial consideration of the matter and only a tentative decision so far as the evidence appears capable of being admissible. Moreover, the courts must be cautious when applying the limits on the rights of an accused to cross-examine and adduce evidence. And so I am of the view that unless such evidence clearly appears to be incapable of being admissible, having regard for the criteria of s. 276(2) and the *indicia* of s. 276(3), the judge should proceed to the evidentiary hearing stage.

[30] In order to appreciate the issues considered by Justice LeBlanc, at the evidentiary hearing, it is helpful to review the provisions of s. 276. (1), (2) and (3).

[31] They provide:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that 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.
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall 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 276.1 and 276.2, that the evidence
>
> (a) is of specific instances of sexual activity;
>
> (b) is relevant to an issue at trial; and
>
> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
>
> (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.

[32] After referring to **R. v. Harris, supra**, Justice LeBlanc said:

> I agree that there are cases saying that one act only can be viewed as being sufficient to capture the incident, as being one that would give rise to an honest and mistaken belief. But, in this instance, the prior sexual intercourse occurred one month prior to the incident giving rise to the charge against Mr. Power.
>
> I, therefore, find that that is not proximate sufficient to allow me to make a finding in favour of the application on that ground.

As noted, s. 276(3) requires the Court to "take into account" seven factors, and a subsequent section (276.2(3)(b)) requires the Court to provide reasons which "must state the factors referred to in ss. 276(3) that affected the determination".

[33] Justice LeBlanc continued:

> On the third ground, which is the issue of significant probative value, I find that that prior act would give rise to significant prejudice because the jury would infer from that that because she had sexual intercourse -- I would be concerned that the jury might infer from that that because she had sexual intercourse one month prior, approximately one month prior, that that would be sufficient to make a finding that she was consenting to the second incident, which is the subject of this charge.
>
> Reviewing the various factors under Section 276(3), I don't find that the evidence has significant probative value to the issue of either honest held belief in consent or a motive to fabricate. And I find that the evidence itself may prejudice the complainant and the proper administration of justice.
>
> I find that the evidence sought to be adduced by Mr. Power and in this application indeed would discourage someone from reporting sexual offences and it might lead the jury to make a finding that they would have some prejudice towards the witness.
>
> On the other grounds, enumerated subsection 3 of this section, this evidence is of a significant nature. It is not mild. It is not like the earlier incident involving [A.A.]. And, of course, the evidence would have significant impact on [the complainant's] personal dignity and right of privacy.
>
> Admittedly, the accused, Mr. Power, should have an opportunity to make a full answer and defence, but I think he can do based on what I see contained in the statement that will be advanced by Mr. Trenholm, at least a statement representing his evidence, will be that the -- at least to this point, will be the fact that there was consent, that the allegation will be based on consent.
>
> I don't think keeping the statement out or the prior conduct out will prejudice and (sic) fact-finding process.
>
> I think that I will confirm that I will be allowing Mr. Pink to examine or cross-examine, depending on who calls Mr. Trenholm, on the conversation he heard. I think I can to that extent.

[34] Counsel for Mr. Power asked the Court for clarification respecting his ability, if he decided to call Mr. Trenholm, to ask whether he heard Mr. Power say to the complainant:

> Well, we've done it before. Why shouldn't we do it again?

[35] After further submissions, Justice LeBlanc determined:

> I am going to allow defence counsel to ask [the complainant] questions dealing with what conversation took place on the morning of January 27 dealing with prior sexual contact, but not of the incident itself.
>
> I am also going to allow Mr. Trenholm to be either cross-examined or examined as to conversations he heard that night.
>
> And also similarly, if the accused is called as a witness and he testifies in the matter, that he will also be entitled to explain the conversation and speak to conversations that occurred on January 27.

[36] The Court also advised counsel that a 276 application was never foreclosed and that if subsequently made, the trial judge would

> ...stipulate I will call [the complainant] back to the stand so that she can be cross-examined further.

[37] Counsel for the appellant, after the jury was recalled, then proceeded with his cross-examination of the complainant respecting the incident of January 25/26, 1997. Counsel did not ask the complainant any questions respecting conversations she had with Mr. Power on the morning of January 27th concerning prior sexual contact.

[38] The jury was excused and the s. 276 application was then continued. Mr. Power was called by his counsel and asked questions relating to the date of the first sexual

encounter. He testified that it had happened "maybe two weeks before Christmas". He testified further that he went home for Christmas, returning to Antigonish about the first or second week of January, saw the complainant perhaps a week later at school, and then again the night of January 26/27. He was not questioned by his counsel respecting any conversation he had with the complainant on the morning of January 27th respecting prior sexual contact.

[39] Crown counsel was permitted to cross-examine Mr. Power. The questions were restricted to the number of occasions Mr. Power came in contact with the complainant. He testified he did not take classes with the complainant but saw her perhaps two or three times a week "in the hallway".

[40] Mr. Trenholm was not called during the *voir dire*, nor during the trial, by either counsel.

[41] After the lunch time adjournment, Justice LeBlanc advised counsel:

> I have reviewed the matter once again in respect of the application made by Mr. Pink on behalf of Mr. Power with respect to Section 276 application dealing with the prior sexual activity between the complainant ...and Mr. Power. I have taken into account the fact that the additional evidence provided by Mr. Power with reference to the time period between the two incidents; namely, the incident referred to in the application and the matter giving rise to the charge against Mr. Power.
>
> Mr. Power has accounted for an additional two to three weeks of his time away from the university and thereby closing the gap between the visits; namely, his availability to be in the area and to have further contact with [the complainant].
>
> Having taken that into account and I thought about the other test set out in the provisions; namely, probative value versus prejudicial impact. I am still of the view that I am going to not allow the application and my position remains and my decision is the same.

[42] The jury was recalled and after the Crown called two further witnesses respecting the complainant's emotional state after the encounter of January 27th. The defence called Mr. Power. He gave evidence respecting the events of January 26th and 27th.

[43] The s. 276 application was not renewed.

Analysis:

[44] The appellant's position is that the trial judge:

> ...erred in law in his application of the rules governing the admissibility of specific instances of sexual activity between the complainant and Mr. Power as provided for in s. 276 of the **Criminal Code**. The defence of honest mistaken belief was a viable defence and the evidence was relevant to this issue. It possessed significant probative value that was not substantially outweighed by any prejudicial effect.

[45] Such an error, the appellant maintains, resulted in a miscarriage of justice, as it rendered the trial unfair. Accordingly. s. 686(1)(a)(iii) of the **Code** requires the conviction be quashed, citing **R. v. Fanjoy**, [1985] 2 S.C.R. 233 at pp. 239-240; **R. v. Morin**, [1992] 2 S.C.R. 286 at p. 294, and **R. v. Morrissey** (1995), 97 C.C.C. (3d) 193 at p. 220 (Ont. C.A.).

[46] Reliance is placed on s. 265(4) of the **Code** which provides:

> 265. (4) Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the

> determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

[47] It is relevant to appreciate that although made on three separate occasions, the last application on behalf of the appellant on the issues relevant to this appeal, was advanced before Mr. Power gave any evidence respecting the circumstances surrounding the encounter of January 26th and 27th, 1997, in his apartment.

[48] The trial judge was asked to consider the s.276 application only in light of:

- the evidence of the appellant during the *voir dire* relating to the December encounter at the complainant's apartment,
- the complainant's trial evidence respecting the January 26th and 27th, 1997, encounter;
- the statement of Mr. Trenholm.

[49] Section 276(2) requires the Court, before permitting the evidence of the previous sexual encounter to be adduced, to determine that the evidence:

(a) is of specific instances of sexual activity;

(b) is relevant to an issue at trial; and

(c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[50] The **Code** provisions do not expressly stipulate the nature of the burden to be applied or on whom the burden rests. A reading of s. 276(2) suggests that the burden

rests on the party seeking to introduce the evidence. The standard should, presumably, be on a balance of probabilities. Stach, J. of the Ontario Court of Justice - General Division, reached this result, in **R. v. Hooper** (unreported), 1993, O.J. No. 3239, August 5, 1993 (adopting a joint submission from counsel).

[51] Subparagraph (a) has obviously been satisfied, indeed, the Crown acknowledged that the complainant's evidence, if before the Court, would not have differed from the consensual sexual activity described by the appellant in the *voir dire*.

[52] The trial judge concluded he could not "make a finding in favour of the application" because:

> ...prior sexual intercourse occurred one month prior to the incident giving rise to the charge against Mr. Power. I, therefore, find that this is not proximate sufficient to allow me to make a finding in favour of the application on that ground.

[53] I am of the opinion, with respect, that in considering s. 276(2)(b), that the trial judge erred when he concluded that the evidence of the previous sexual encounter was not relevant to the issue of honest but mistaken belief in consent. There was, in my opinion, some relevance to the issue at trial disclosed by the record before the judge at the time this ruling was made. I come to this conclusion for the following reasons:

- Mr. Power and the complainant were not strangers. They attended the same university and occasionally saw each other on campus. They had no social relationship beyond the two incidents in questions. Both sexual encounters took place in the early hours of the morning after the

complainant had attended a local bar. On the first occasion they walked to her apartment together from the bar. On the second occasion, a series of telephone conversations led to her initially going to his apartment at 2:00 a.m., then returning to her own apartment, and finally agreeing to be picked up by him to return to his apartment sometime after 2:00 a.m. On both occasions, shortly after they were alone, consensual sexual contact commenced. In light of the previous encounter, and her willingness to come back to his apartment, in the early hours of the morning, his anticipation of further sexual relations at that point might be viewed as reasonable;

– Some support, respecting the relevance of the defence, is supplied by a response the complainant gave to Crown counsel respecting the January 27th incident when the subject of her menstrual period was raised. The complainant answered:

> He asked why I didn't tell him and I had said that I had been telling him no for the last number of minutes, the whole duration, and he just got up and nonchalantly remarked, "I never heard you say no." ....

The following exchange occurred in cross-examination:

> Q. And I am going to suggest to you at that time after your pants came off, your panties were still on, that at no time did you holler, scream out, knowing that there were people in that house.
> A. At that point, I didn't realize Andrew wouldn't hear - he wouldn't hear me saying stop. (emphasis added)

– I do not consider, in the circumstances of this case, that the interval of approximately four to six weeks between the two encounters was a

> significant factor. Mr. Power had been out of the province for at least three of those weeks during the Christmas vacation period. Justice O'Connor, in **R. v. Mohammed**, for example, allowed the complainant to be examined respecting previous sexual encounters with the accused that extended over a period of at least nine months before the alleged assault.

[54] The relevance of proximity in time should not be determined by merely counting the days, or months, that have elapsed between the two encounters, but should be determined, as suggested by Justice Moldaver, for the Court, in **Harris**, at p. 508:

> ...on a case-by-case basis having regard to all the circumstances, including but not limited to:
> - the viability of the defence, itself;
> - the nature and extent of the prior sexual activity as compared to the sexual activity forming the subject-matter of the charge;
> - the time frame separating the incidents; and
> - the nature of the relationship between the parties. (emphasis added)

[55] In short, I conclude that the appellant has established that the prior sexual activity is relevant to an issue at trial, and therefore, meets the requirement of s. 276 (2)(b).

[56] Notwithstanding the appellant's success in meeting the provisions of s. 276(2)(a) and (b), it is still necessary for the appellant to satisfy the Court that the evidence:

> ...has significant probative value that is not substantially outweighed by danger or prejudice to the proper administration of justice.

[57] In view of his conclusion that the previous sexual activity was not relevant to a trial issue, it was not essential for Justice LeBlanc to determine the issue raised by s.

276(2)(c). However, he did consider the issue, and concluded that the evidence did not meet the standard imposed. In view of my opinion that he erred in his assessment of the relevancy issue, it is, therefore, helpful to refer to his comments on the issue raised by s. 276(2)(c).

[58] In considering the three issues specified in s. 276(2), the trial judge is required to take into account seven enumerated factors, specified in s. 276 (3), including the potential prejudice to the complainant's personal dignity and right of privacy (s.276(3)(f)). It is not necessary, for the purposes of this appeal, to determine whether the interests of the complainant should be considered as being “on the same level” as the accused’s right to make full answer and defence, as suggested by Professor Stuart (1993), 42 U.N.B.L.J. 349, at p. 350. In this case, the trial judge has concluded that the evidence of the previous encounter would have "significant impact" on her personal dignity and right of privacy. I agree. She was, according to Mr. Power, an ardent participant in a sexual experience on what could be classified as a "first date".

[59] With respect to s. 276(2)(c), the trial judge clearly had the words of the section in mind as he quoted the section, before entering upon his determination, and analysis.

[60] While satisfied that the evidence was of a “significant nature”, in the sense of impacting on the complainant’s personal dignity and right of privacy, Justice LeBlanc expressly determined that it did not have “significant probative value” to the defences

raised. In Justice LeBlanc's view, Mr. Power failed to establish that he had met the test set out in the opening words of s. 276(3)(c).

[61] The evidence bears out this conclusion. The scope of examination suggested by Justice Moldaver in **Harris** is not a closed list but subject to expansion depending upon the circumstances. In the circumstances of this case, in determining whether the probative value of the previous sexual encounter is significant, it is helpful to contrast the description given in evidence concerning the physical actions of the complainant, as well as her verbal expressions, on each of the two occasions.

[62] During the December incident, after engaging in petting and kissing, Mr. Power testified that she:

> ...Lifted my shirt out of my pants ... she slid [her bra] off her arm ... she unbuttoned my pants ... and pulled them down ... she was rubbing my bum and my penis and my thighs ... she pulled my underwear down and took my underwear off ...

[63] Thereafter he testified that she actively participated in sexual intercourse for five, to ten minutes, before he ejaculated in her. There was, according to his evidence, virtually no conversation between the parties from the time they lay on her bed, until he went home about an hour later.

[64] The following exchange between the appellant and his counsel, makes the point:

> Q. At any time was there any conversation going on between you and her?
> A. Not that I can recall.

and later,

> Q. And tell me, during that act of intercourse did she say anything to you?
> A. No, sir.

[65] According to the appellant, the only words spoken during the December encounter was when:

> I asked her what her favorite position was.

[66] The complainant made no verbal response but:

> She kind of smirked and sat there for a second and then she got on her knees and hands and turned her buttock towards me. And she moved her - like herself toward me and I inserted my penis in her.

[67] The absence of conversation may be explained, in part, as the complainant's room mate was "sleeping on the couch" in the living room, when they arrived at approximately 2:30 a.m. However, a similar situation arose on January 27th, as disclosed in the complainant's evidence:

> He told me to be extremely quiet as there was a lady upstairs sleeping, a friend of the owner. And we took our shoes off by the door and proceeded down the steps and we went into the den, which is to the right of the stairs.

[68] Notwithstanding this instruction, the complainant, upon her arrival in the den, initiated small talk respecting the hockey season, as the appellant was playing on the university hockey team the following day.

[69] After some kissing and petting, she testified she made her wishes clear:

> I told him I wanted things to go slow. I had told him that I wanted to talk. I would like to get to know him better. He had told me that he wanted to make it with me. I had told him that I didn't want to do anything that evening. That I was just there to talk to him and to get to know him.

[70] On at least seven occasions she asked him to “slow down”, that she “just wanted to talk”, that she didn’t want to do “anything” that evening. She told him that she didn’t want “my jeans to come off”. She also told him “I didn’t want to do it ... to have sex”.

[71] Unlike the December incident, according to her evidence, she actively resisted his physical advances on the occasion in his apartment.

[72] She testified she "pushed him off" when she told him she didn't "want to do anything".

[73] After he pulled her jeans off, he "got back on top of me and ...pressed against me so hard I couldn't breathe".

[74] She then pulled away from him and inched her way off the blanket when he "pulled me back onto the blanket...got back on top of" her and penetrated her.

[75] The statements of Mr. Trenholm do not, in my opinion, support the appellant’s position of honest but mistaken belief in consent. Rather, Mr. Trenholm’s comments, are consistent with the complainant’s position that she did not consent to sexual intercourse. The appellant may have had an expectation of consensual sexual activity because of the willingness of the complainant to come to his apartment at 2:15 a.m. Any expectation, however, according to the complainant, should have been extinguished by her actions and words.

[76] I would take from Justice LeBlanc's reasons (supplied pursuant to the mandate of s. 276.2(3)(b)) that his determination was affected by a consideration of s. 276(3)(a), (b) and (f).

[77] With respect to s. 276(3)(a), the trial judge took, what I consider to be, fair and reasonable steps to ensure that the appellant could make full answer and defence by the following measures:

- permitting counsel to examine or cross-examine Mr. Trenholm, on the conversation he heard;
- permitting counsel to cross-examine the complainant as to whether Mr. Power said "We've done it before so why shouldn't we do it again?";
- permitting counsel, if he called Mr. Power, to question him respecting the conversation.

[78] Counsel did not elect to exercise any of the opportunities presented by the trial judge, presumably for tactical reasons.

[79] Section 276(3)(b) requires the Court to take into account society's interest in encouraging the reporting of sexual assault offences. I agree with Justice LeBlanc that any complainant faced with public disclosure of intimate sexual conduct, similar to that disclosed, by the appellant, would be dissuaded from reporting any subsequent incident.

[80] For the reasons given, I do not consider that there is a reasonable prospect that the evidence would assist in arriving at a just determination in the case. In fact, as Justice LeBlanc pointed out that:

> I would be concerned that the jury might infer from that because she had sexual intercourse ... approximately one month prior, that that would be sufficient to make a finding that she was consenting to the second incident, which is the subject of this charge.

[81] That comment governs the remaining provisions enumerated in s. 276(3).

[82] Given the development of the evidence before Justice LeBlanc, the appellant's expectation of consent was of little relevance as contrasted with the risk of the prejudicial effect of admitting it.

[83] I would adopt the words of Finlayson, J.A., on behalf of the Court of Appeal for Ontario, in **R. v. Santocono** (1996), 28 O.R. (3d) 630 at 637 where he said:

> ..... On the other hand, this evidence had a serious potential to prejudice the proper administration of justice by diverting the jury from the real issues in the case and arousing sentiments of prejudice and hostility toward the complainant.

[84] In short, the "danger of prejudice to the proper administration of justice" is substantial, in particular, when the evidence of the previous sexual encounter has no significant probative value at all.

Conclusion:

[85] I am satisfied that the trial judge committed no error when he determined that the December sexual encounter did not have significant probative value and, accordingly, rejected the application to admit the evidence of the previous sexual encounter. Once having made that decision, it was not necessary for him to determine that the admission of the evidence would result in a danger of prejudice to the proper administration of justice. I agree with the trial judge, however, and I am satisfied that there would have been a substantial danger of prejudice to the proper administration of justice if the evidence were to be admitted.

[86] Finally, I am satisfied that in view of the ancillary rulings made respecting the conversation allegedly overheard by Mr. Trenholm, that the appellant was not deprived of making a full answer and defence.

[87] Accordingly I would dismiss the appeal.

Pugsley, J.A.

Concurred in:

Chipman, J.A.

Cromwell, J.A.