NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Webber*, 2021 NSCA 35

Date: 20210427
Docket: CAC 484362 and 485286
Registry: Halifax

Between:

Renee Allison Webber

Appellant

v.

Her Majesty the Queen

Respondent

and

Between:

Her Majesty the Queen

Appellant

v.

Renee Allison Webber

Respondent

Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code*

Judge:	The Honourable Justice David P.S. Farrar
Appeal Heard:	November 24, 2020, in Halifax, Nova Scotia
Subject:	Criminal Law. Territorial Jurisdiction. Procuring a person under the age of 18. Admissibility of evidence pursuant to s. 276 of the *Criminal Code*.
Summary:	The appellant, Renee Allison Webber, was convicted of advertising to provide sexual services for consideration (s. 286.4 of the *Criminal Code*); receiving a financial or material benefit resulting from the commission of an offence (s.

279.02(2) of the *Criminal Code*); procuring a person under the age of 18 years (s. 286.3(2) of the *Criminal Code*); sexual exploitation (s. 279.011(1) of the *Criminal Code*); and touching for a sexual purpose (s. 153(1)(a) of the *Criminal Code*).

On the Indictment, the s. 153(1)(a) charge was alleged to have occurred in Moncton, New Brunswick.

Ms. Webber appeals alleging the trial judge committed a number of errors in her instructions to the jury and in finding Nova Scotia court had territorial jurisdiction over the charge alleged to have occurred in Moncton, New Brunswick. Further, she could not have been convicted of the advertising for sexual services charge as a principal because there was no evidence she, personally, placed an advertisement. Finally, the appellant argues the trial judge erred in not allowing the defence to question the complainant on previous sexual activity she had with a former co-accused of Ms. Webber.

Issues:

(1) Did the trial judge err in applying the law of provincial territorial jurisdiction?
(2) Did the trial judge err in charging the jury on liability as a principal for the offence of advertising contrary to s. 286.4 of the *Criminal Code*?
(3) Did the trial judge err in denying the defence application under s. 276 of the *Criminal Code?*

Result:

Appeal allowed. The trial judge erred in finding that she had territorial jurisdiction to try the sexual touching charge. The Indictment made no reference to the offence having occurred in Nova Scotia, which precluded the court from having jurisdiction.

The Crown conceded that the trial judge erred in charging the jury on liability as a principal for the offence of advertising to provide sexual services for consideration. There was no evidence, and therefore, no air of reality that Ms. Webber committed the *actus reus* of that offence.

The trial judge also erred in denying the defence application under s. 276 of the *Criminal Code*. The defence sought to introduce evidence to show that it was Ms. Webber's co-accused, Kyle Pellow, who exercised control over M.M.S. and not whether the complainant consented to such activity.

As a result of the trial judge's errors, a judicial stay is entered on the charge of touching for a sexual purpose (s. 153(1)(a) of the *Criminal Code*) and a new trial ordered on the remaining charges.

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Restriction on Publication: Sections 486.4 and 486.5 of the *Criminal Code*

Judges:	Beveridge, Farrar and Beaton, JJ.A.
Appeal Heard:	November 24, 2020, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Farrar, J.A.; Beveridge and Beaton, JJ.A. concurring
Counsel:	Lee Seshagiri, on behalf of Renee Allison Webber Timothy O'Leary, on behalf of Her Majesty the Queen

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Order restricting publication – victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Reasons for judgment:

Introduction

[1] On September 23, 2018, after trial before a jury with Justice Christa M. Brothers presiding, the appellant, Renee Allison Webber, was convicted of advertising to provide sexual services for consideration (s. 286.4 of the *Criminal Code*); receiving a financial or material benefit resulting from the commission of an offence (s. 279.02(2) of the *Criminal Code*); procuring a person under the age of 18 years (s. 286.3(2) of the *Criminal Code*); sexual exploitation (s. 279.011(1) of the *Criminal Code*); and touching for a sexual purpose (s. 153(1)(a) of the *Criminal Code*).

[2] At the commencement of trial, Ms. Webber pled guilty to common assault (s. 266 of the *Criminal Code*).

[3] She was sentenced to a total of four years in a federal penitentiary for the offences with ancillary orders.

[4] Ms. Webber appeals her convictions. The Crown cross-appeals the trial judge's finding that the mandatory minimum sentences in ss. 279.02(2) and 279.011(1)(b) of the *Criminal Code* are unconstitutional.

[5] For the reasons that follow, I would allow the appeal, stay the s. 153(1)(a) charge, and order a new trial on the remaining charges. In light of this, it is not necessary to address the Crown's cross-appeal.

Procedural Background

[6] The complainant, M.M.S., provided a statement to police in May of 2016. She said she was the victim of criminal activity at the hands of Ms. Webber and Ms. Webber's then-boyfriend, Kyle Pellow. Both Ms. Webber and Mr. Pellow were charged with human trafficking and numerous associated offences.

[7] A Preliminary Inquiry was held in Provincial Court between November 2016 and April 2017, when both Ms. Webber and Mr. Pellow were committed to stand trial. On April 26, 2017, a 12-count Indictment was filed against both of them. A jury trial was scheduled.

[8] On May 2, 2018, Mr. Pellow re-elected to be tried in the Provincial Court. He pled guilty to three offences: trafficking a person under 18 years of age, advertising for sexual services, and breach of a recognizance. He was sentenced to six years custody following a joint recommendation.

[9] On September 4, 2018, the Crown filed a substitute indictment against Ms. Webber which eliminated any reference to Mr. Pellow (the Indictment). The Indictment charged Ms. Webber as follows:

> 1. That she between the 1st day of October, 2015 and the 22nd day of May, 2016 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did knowingly advertise an offer to provide sexual services for consideration contrary to Section 286.4 of the *Criminal Code*.
>
> 2. AND FURTHER that she at the same time and place aforesaid, did unlawfully assault [M.M.S.], contrary to Section 266 of the *Criminal Code*.
>
> 3. AND FURTHER that she at the same time and place aforesaid, did unlawfully receive a financial or other material benefit knowing that it resulted from the commission of an offence under subsection 279.011(1), contrary to Section 279.02 of the *Criminal Code*.
>
> 4. AND FURTHER that she at the same time and place aforesaid, for the purpose of facilitating the purchasing offence, did exercise control direction, or influence over the movements of a person under the age of 18 who offers or provides sexual services for consideration, contrary to section 286.3(2) of the *Criminal Code*.
>
> 5. AND FURTHER that she at the same time and place aforesaid, did recruit, transport, transfer, harbour or exercise control, direction or influence over the movements of [M.M.S.], a person under the age of 18 years, for the purpose of exploiting her or facilitating her exploitation, contrary to Section 279.011(1) of the *Criminal Code*.
>
> 6. AND FURTHER that she at the same time and place aforesaid, did unlawfully and willfully obstruct Cst. Dann Berube and D/Cst. Jennifer Murray, Peace Officers, while engaged in the lawful execution of their duty, contrary to Section 129(a) of the *Criminal Code*.
>
> 7. AND FURTHER that she at Moncton, New Brunswick, at the same time aforesaid, being a person in a relationship with [M.M.S.], a young person, that is exploitive of [M.M.S.], did for a sexual purpose directly touch a part of [M.M.S.], contrary to Section 153(1)(a) of the *Criminal Code*.
>
> 8. AND FURTHER that she at Moncton, New Brunswick, at the same time aforesaid, did unlawfully commit a sexual assault on [M.M.S.], contrary to Section 271 of the *Criminal Code*.

[10] Ms. Webber was arraigned before the jury on September 4, 2018. She pled guilty to Count 2 – common assault contrary to s. 266 of the *Code*. She entered not guilty pleas to the remaining counts.

[11] The Crown presented evidence from September 4 to September 14, 2018, calling six witnesses. During M.M.S.'s testimony, the defence was unsuccessful in making an application under s. 276 of the *Criminal Code*. As a result, Ms. Webber's counsel was prohibited from cross-examining on two instances of sexual contact between M.M.S. and Mr. Pellow.

[12] At the close of the Crown's case, the defence applied for a stay of proceedings on the sexual assault (s. 271) and sexual touching (s. 153(1)(a)) charges, which were alleged to have occurred in New Brunswick, arguing a lack of territorial jurisdiction. The trial judge stayed the sexual assault charge, but concluded that the Court had jurisdiction to try the sexual touching charge.

[13] The defence called evidence. On September 17, 2018, Ms. Webber took the stand in her own defence. Her testimony was completed on September 18, 2018.

[14] On September 19, 2018, the Crown and defence made their closing arguments to the jury. A pre-charge conference with the trial judge took place on September 20, 2018.

[15] On September 21, 2018, the trial judge delivered her charge to the jury.

[16] The jury deliberated the morning of September 22, 2018. That afternoon, three jury questions were presented to the Court as follows:

1) Can you, please, review common purpose;

2) Can you, please, clarify count 4, specifically in regards to what "procuring" relates to; and

3) Does withholding information from a police officer constitute an obstruction of that officer's duties and make the end result more difficult to achieve?

[17] After discussion with counsel, the trial judge delivered supplemental instructions to the jury in response to the three questions. Deliberations continued on the afternoon of September 22, 2018, and the morning of September 23, 2018.

[18] On the afternoon of September 23, the jury asked another question. They queried: "Good afternoon. If we cannot reach a unanimous decision on one charge, even though we reached a unanimous decision on all other charges, what should we do?" After discussion with counsel, the trial judge encouraged the jury to reach a unanimous verdict.

[19] On September 23, 2018, the jury reached a verdict. Ms. Webber was found guilty of the offences previously outlined. She was acquitted of the obstruction charge.

[20] Prior to sentencing, Ms. Webber challenged the constitutionality of mandatory minimum sentences for the guilty verdicts on s. 279.02(2), 286.3(2), and 279.011(1)(b). The mandatory minimum sentence in s. 153(1)(a) had previously been found unconstitutional in *R. v. Hood*, 2018 NSCA 18.

[21] The s. 286.3(2) charge was judicially stayed by application of the *Kienapple* principle. Therefore, it was not necessary to decide whether the mandatory minimum sentence was unconstitutional for that offence. The trial judge found that the mandatory minimum sentences for ss. 279.02(2) and 279.011(1)(b) were unconstitutional.

[22] On January 17, 2019, Ms. Webber was sentenced to a global term of four years in a federal penitentiary.

[23] On September 5, 2019, Ms. Webber was granted bail and was released on a Recognizance pending the outcome of this appeal.

Background[1]

[24] M.M.S. went from being a grade 10 high school student to a sex-trade worker operating, at various times, in Nova Scotia, New Brunswick and Ontario.

[25] M.M.S. explained that in September 2015 she dropped out of high school, was evicted from her home by her mother, and moved in with a friend named Julia.

[26] Julia was older than M.M.S. and worked as an escort. When M.M.S. moved in, Julia introduced her to the business. She showed M.M.S. how to post advertisements for sex work on a website called "Backpage". She brought M.M.S.

[1] Although the Crown called five other witnesses in addition to M.M.S., the outcome of the trial rested primarily on the testimony of M.M.S. and Ms. Webber. As the appellant has done in her factum, I will outline the relevant testimony in some detail.

along on one of her calls and shared some of the earnings with her. M.M.S. described being surprised she could have sex with somebody and get money for it.

[27] M.M.S. said she and Julia attended a party at Ms. Webber's home. At that time, she was introduced to Ms. Webber's then-boyfriend, Mr. Pellow. Following the party, M.M.S. went on car drives with Mr. Pellow.

[28] M.M.S. was invited to accompany Julia and Mr. Pellow on a trip to New Brunswick. Her understanding was that Mr. Pellow would get Julia a hotel room in Moncton for sex work. M.M.S. joined on the trip. She said that Julia posted ads for sexual services on Backpage and that she (M.M.S.) was probably advertised in the Backpage ads as well, including by way of text and photographs, but that she did not engage in any sex work herself.

[29] M.M.S. could not remember when she next had contact with Ms. Webber after the party. She described taking a drive with Ms. Webber, when she related the following conversation which she said prompted her to move out of Julia's residence and into Ms. Webber's home:

> A. And she was kind of just telling me about how I'm so much prettier than Julia, and that I shouldn't be hanging out with Julia, and Julia's bad news and that I shouldn't be living with her, and that, if I was to live with her, that she could provide so much more for me, and kind of like -- almost like a mother would. If that makes any sense.
>
> …
>
> A. Just that I was so much better than her and that -- why am I hanging out with somebody like that, and that she could get me so much farther in life, and that I could go live with her and everything would be great and I wouldn't have to worry about anything and...
>
> Q. Okay. Well, what was your understanding of what you were going to do when you were living at Renee Webber's house?
>
> A. She had mentioned to me that -- well, she had said to me that she was a stripper and that Kyle was kind of like, protection, I guess. Like, that was what he -- she put it in like -- said that we were going to be like a team, like, I was going to be an escort and I was going to be sleeping with these men, and that she was going to be a stripper, and that he was going to be, like, protection and that. They were going to help me get into school, and just everything that I had wanted for my life, they said that they could help and -- help me get to.
>
> Q. Did she tell you what you would get from having sex with these men?
>
> A. Just -- not really anything, just that she -- they would help me get into school and that it would help me have a family and have a good life.

[30] M.M.S. left Julia's residence the same day and moved into Ms. Webber's basement, where she resided along with Ms. Webber's eldest son and one of his friends. Ms. Webber lived upstairs with her second son and her daughter.

[31] About a week after she moved into Ms. Webber's house, M.M.S. said she was told by Ms. Webber that she would be relocating to and working from Mr. Pellow's mother's house. M.M.S. testified that Ms. Webber drove her to a parking lot to meet with Mr. Pellow.

[32] M.M.S. stayed at Mr. Pellow's mother's house for about a week, during that time Mr. Pellow drove her to calls with men which had been arranged by him via Backpage ads. She explained: "I met with these men and had sex with them for money". After she was done, she gave the money to Mr. Pellow. M.M.S. testified that after a week of such work she returned to Ms. Webber's house.

[33] After returning to live with Ms. Webber, M.M.S. travelled to Moncton on weekends. She said she went to Moncton more than once with Mr. Pellow, once with only Ms. Webber, and once with both Mr. Pellow and Ms. Webber.

[34] When she went to Moncton alone with Mr. Pellow, Ms. Webber dropped her off at a parking lot in Halifax to meet him. Mr. Pellow then drove her to Moncton and rented a hotel room. M.M.S. posted her own ads for sex work on Backpage and engaged in sex with men for money.

[35] M.M.S. testified that when she went to Moncton alone with Ms. Webber, she also had sex with men for money. She said that she and Ms. Webber advertised their services together as a sexual duo on Backpage. When it came time for intercourse, M.M.S. had sex with the man while Ms. Webber, either naked or in her bra and underwear, sat and watched. M.M.S. testified that Ms. Webber received the money.

[36] Regarding the trip to Moncton with both Ms. Webber and Mr. Pellow, M.M.S. testified about a bachelor party which Mr. Pellow arranged. She and Ms. Webber attended, and just walked around and talked to the men while dressed in their bras and underwear.

[37] Later that same night in Moncton, M.M.S. said she was forced to engage in non-consensual unprotected oral and vaginal sex with both Ms. Webber and Mr. Pellow.

[38] M.M.S. also described a trip she took to Toronto, Ontario, with Mr. Pellow. She testified that Ms. Webber told her Mr. Pellow was leaving for Toronto in half an hour, and she was to pack her bag. Ms. Webber drove her to a parking lot where she got into a rental car with Mr. Pellow and two other sex workers and they drove to a Super 8 Motel in Mississauga, Ontario.

[39] While in Toronto, M.M.S. engaged in sex work at the motel arranged through Backpage ads, and performed sex work in a spa/massage parlour. The money she earned on the trip was given to Mr. Pellow. Upon returning to Nova Scotia, M.M.S. continued to reside with Ms. Webber.

[40] Finally, M.M.S. described attending with Ms. Webber at the Chebucto Inn in Halifax, also for the purpose of having sex with men for money. Calls were set up by M.M.S., via Backpage ads.

[41] M.M.S. testified that she stopped engaging in sex work in late November 2015. She said there was an understanding that if she was dating Ms. Webber's son she would not continue in the escort business.

[42] At some point in early 2016 she moved out of Ms. Webber's home, broke up with Ms. Webber's son, and moved back in with her mother. She also resumed hanging out with Julia and returned to working in the sex trade.

[43] M.M.S. went to police in May of 2016 after being confronted by Ms. Webber while walking down the street. According to M.M.S., Ms. Webber was angry, pulled her by the collar, and said: "Don't … talk about my family, don't talk about me, keep my family's name out of your mouth." She testified that Ms. Webber then slapped her across the face with an open hand before leaving in her car. M.M.S. provided a statement to police the next day, which lead to the charges against Ms. Webber and Mr. Pellow.

[44] Ms. Webber admitted to slapping M.M.S. on the face in May of 2016. She explained that M.M.S. had been dating her son, and that M.M.S. had been harassing him since they broke up. Ms. Webber plead guilty to common assault as a result of this incident.

[45] Except for this admission, the evidence of Ms. Webber was in stark contrast to that of M.M.S.

[46] Ms. Webber described meeting M.M.S. through her children around November 2015. She testified that M.M.S. lived at her home from November until

the end of December 2015. Her son asked if M.M.S. could stay with them because M.M.S. was kicked out of her home and had had an argument with a friend she had been staying with.

[47] Ms. Webber testified that she took M.M.S. to the laundromat, the grocery store, and to visit her mother. She said she had spoken with both M.M.S.'s mother and father during the months of November and December 2015, including at one point alerting M.M.S.'s mother that her daughter was sick.

[48] Ms. Webber denied M.M.S.'s allegation M.M.S. was prevented from leaving her home. Ms. Webber said it was no secret that M.M.S. was staying with her.

[49] Ms. Webber denied having any knowledge of or connection to prostitution, saying that M.M.S.'s allegations were false.

[50] Ms. Webber testified that she was unaware that M.M.S. had a relationship with Mr. Pellow, and was unaware that M.M.S. had been engaging in paid sex work while living at her home. She was also unaware of the association between Mr. Pellow and Julia.

[51] She denied dropping M.M.S. off at parking lots, denied going to Moncton with Mr. Pellow and M.M.S., denied going to Moncton alone with M.M.S., and denied sexually touching M.M.S.

[52] She explained that she had a credit card and when she rented vehicles and hotel rooms to assist Mr. Pellow, she assumed it was legitimate.

[53] Finally, Ms. Webber denied ever posting a Backpage ad or discussing advertisements for sexual services with M.M.S.

[54] There was evidence Ms. Webber:

- rented a hotel room at the Moncton Hotel from November 27 to November 29, 2015;
- rented a hotel room at the Chebucto Inn with an arrival date of November 14, 2015, and an expected departure date of November 15, 2015; and
- rented a car from November 13 to November 18, 2015, and from November 19 to December 14, 2015.

[55] With this backdrop, I will turn to the issues on this appeal.

Issues

[56] The appellant raises seven issues in her Factum. It is only necessary to deal with three on this appeal. I would reword the issues and address them in the following order:

1) Did the trial judge err in applying the law of provincial territorial jurisdiction?

2) Did the trial judge err in charging the jury on liability as a principal for the offence of advertising contrary to s. 286.4 of the *Criminal Code*[2]?

3) Did the trial judge err in denying the defence application under s. 276 of the *Criminal Code*?

Standard of Review

[57] The first and third issues are questions of law and are to be reviewed on a correctness standard. The parties agree that is the appropriate standard of review for those issues.

[58] With respect to the second issue, this Court noted the principles that apply to evaluating a trial judge's jury charge in *R. v. Johnson*, 2017 NSCA 64:

> 44 Before discussing the substance of the appellant's complaints, it is important to be clear about the principles appellate courts must apply when called on to evaluate the sufficiency of a trial judge's jury charge.
>
> 45 The appellant simply says the trial judge must be correct when instructing a jury on the legal principles that will guide their adjudicative responsibility, and cites *R. v. Miller*, 2009 NSCA 71 at para. 14. It is easy to say that a trial judge must get it right when he or she charges the jury on the law. But, as recognized and discussed in *Miller* (see paras. 17-19), that does not mean a trial judge must state the law perfectly.
>
> 46 As Lamer C.J.C. wrote two decades ago in *R. v. Jacquard*, [1997] 1 S.C.R. 314, if perfection were the standard, no jury charge would pass appellate review (paras. 1-2).
>
> 47 The overarching question is whether the jury was properly instructed. This requires an appellate court to take a functional approach. This approach triggers

[2] The Crown concedes this ground of appeal.

> certain interconnected principles. It requires an assessment of the putative error in light of the live issues at trial, the position of the parties before the trial judge, and the overall effect of the charge, without undue focus on isolated phrases or minute dissection. Substance prevails over form (see: *R. v. Jacquard, supra*; *R. v. MacKinnon* (1999), 132 C.C.C. (3d) 545 (Ont. C.A.); *R. v. Daley*, 2007 SCC 53; *R. v. Araya*, 2015 SCC 11; *R. v. Rodgerson*, 2015 SCC 38 at para. 54; *R. v. Robinson*, 2016 BCCA 192; *R. v. Cromwell*, 2016 NSCA 84 at paras. 25-26).

Analysis

Issue 1: Did the trial judge err in applying the law of provincial territorial jurisdiction?

[59] The Indictment filed by the Crown at the commencement of the trial alleged two offences occurred in Moncton, New Brunswick:

> 7. AND FURTHER that she at Moncton, New Brunswick, at the same time aforesaid, being a person in a relationship with [M.M.S.], a young person, that is exploitive of [M.M.S.], did for a sexual purpose directly touch a part of [M.M.S.], contrary to Section 153(1)(a) of the *Criminal Code*.
>
> 8. AND FURTHER that she at Moncton, New Brunswick, at the same time aforesaid, did unlawfully commit a sexual assault on [M.M.S.], contrary to Section 271 of the *Criminal Code*. [Emphasis added]

[60] Prior to the close of the Crown's case, defence counsel sought a stay of proceedings of both New Brunswick charges for lack of territorial jurisdiction, relying on s. 478(1) of the *Criminal Code*:

> *Offence committed entirely in one province*
>
> 478 (1) Subject to this Act, a court in a province shall not try an offence committed entirely in another province.[3]

[61] The defence argued that neither the s. 271 charge nor the s. 153(1)(a) charge could be tried in Nova Scotia in light of s. 478(1).

[62] The Crown relied on s. 476 of the *Criminal Code* in asking the court to find it had jurisdiction:

> *Special jurisdictions*
>
> 476 For the purposes of this Act,

[3] None of the exceptions to this provision in the *Code* apply to the facts of this case.

> (b) where an offence is committed on the boundary of two or more territorial divisions or within five hundred metres of any such boundary, or the offence was commenced within one territorial division and completed within another, the offence shall be deemed to have been committed in any of the territorial divisions;

[63] The Crown argued that jurisdiction existed for the sexual assault charge because of a real and substantial link with Nova Scotia. Jurisdiction was said to exist for the s. 153(1)(a) offence because the element of exploitation occurred in Nova Scotia.

[64] After hearing from the parties, the trial judge provided an oral decision. She concluded the Court did not have jurisdiction to proceed on the sexual assault charge.

[65] The trial judge sought further submissions with respect to the s. 153(1)(a) charge. In particular, she asked the Crown to address the apparent disconnect between the prosecution's position on jurisdiction and the words appearing on the Indictment:

> Like count 8, count 7 is framed that at Moncton, New Brunswick, and there's no reference to Nova Scotia at all in that count on the indictment. And so on the face of it, it seems that the Crown, in indicting Ms. Webber with this charge under the *Criminal Code*, is contending that all of the essential elements occurred in Moncton, New Brunswick, including that at that point in time in Moncton, New Brunswick, that she was in a relationship that was [exploitative] of [M.M.S.].
>
> So I wanted to hear from the Crown about that, that the indictment is framed as just in Moncton, New Brunswick, which appears to purport to cover all of the essential elements in that charge.

[66] The Crown reiterated its position that territorial jurisdiction existed despite the wording of the Indictment, because the exploitative relationship at issue had been nurtured or cultivated in Nova Scotia. The Crown argued the wording of the Indictment did not matter for the purposes of the trial judge's analysis.

[67] The trial judge denied the defence application with respect to the s. 153(1)(a) charge. She concluded that there were interprovincial aspects to the offence and agreed with the Crown that there was evidence that the exploitation element of the offence occurred in Nova Scotia:

> [51] However, in relation to section 153(1)(a), I conclude there are interprovincial aspects to this offence. The essence of the Crown's case is that the complainant's movements were controlled and influenced by, among others, the

> accused, and this was done to exploit the complainant. This relates back to s. 153(1)(a) and the essential elements of that charge, including that there be an exploitative relationship. The evidence of an exploitative relationship was that it was created, evolved and was cultivated in Nova Scotia. I accept that it is not merely a "status" but an essential element. I accept the Crown's argument that but for the alleged exploitative relationship, the complainant would not have been in Moncton.
>
> [52] The alleged act of touching for a sexual purpose relates to a hotel room in Moncton, New Brunswick, but it does not arise in isolation, on its own. But for the alleged exploitative relationship, the complainant would not have been in Moncton.
>
> [53] The alleged exploitative relationship began and was cultivated in Nova Scotia. The alleged coercion resulted in the complainant being in Moncton, New Brunswick. All the evidence concerning the creation and development of the exploitative relationship is almost entirely in Nova Scotia. (*R. v. Webber*, 2018 NSSC 343, *Voir Dire* #8 Decision)

[68] Respectfully, the trial judge erred in finding the Nova Scotia courts had jurisdiction over the s. 153(1)(a) charge.

[69] There is a broad basis for claiming jurisdiction over continuing and/or inter-provincial offences under s. 476 of the *Code*. The Ontario Court of Appeal in *R. v. Bigelow*, (1982) 37 O.R. (2d) 304, succinctly set out the test for claiming territorial jurisdiction under s. 476:

> 11. …The test in reality has become whether any element of the offence has occurred in the province claiming jurisdiction…

[70] When an indictment or an information charges an offence within the geographic boundaries of a court's home province or territory, territorial jurisdiction is claimed.

[71] The problem with the trial judge's reasoning in the present case is that the Indictment never claimed jurisdiction on behalf of Nova Scotia.

[72] When an indictment or an information charges an offence outside the provincial or territorial boundaries of the court, there is no territorial jurisdiction to preside over the case. As McQuaid J. (as he then was) explained in *R. v. Davis*, [1979] 23 Nfld. & P.E.I.R. 422:

> [4] Strangely, counsel for the appellant made no reference to the fact that <u>on the face of the information the provincial court judge in Prince Edward Island would have no jurisdiction over an offence purported to have been committed at</u>

> Middleton in the said Province (of New Brunswick). Without amendment, which could have been made at any time prior to conviction, but of which amendment there is no record, the judge was clearly without jurisdiction. [Emphasis added]

[73] This literal approach to territorial jurisdiction makes sense. It provides trial judges with a quick, clear and effective method of determining the *situs* of the offence and whether the prosecution is being pursued in the appropriate judicial forum.

[74] The courts of one provincial jurisdiction cannot try offences alleged to have taken place exclusively within a different provincial jurisdiction.

[75] Before the trial judge, the Crown argued that Nova Scotia had jurisdiction, citing as authority *R. v. Bigelow*; *R. v. Masoudi*, 2016 ONCJ 476; *R. v. Patrois*, 2016 ONSC 4695; *R. v. Hammerbeck*, [1993] B.C.J. No. 685 (CA); and *R. v. Doer*, [1999] M.J. No. 40 (QB). On this appeal, it relies on *R. v. Ibeagha*, 2019 QCCA 1534, to support its argument that Nova Scotia has territorial jurisdiction.

[76] There is a critical distinction between those decisions and this case. Unlike the present case, the informations or indictments underlying those cases specifically claimed that the offence was committed, at least in part, within the trial court's territorial jurisdiction.

[77] *Bigelow* (Ontario) charged an offence in Ontario "at the City of London in the County of Middlesex". In *Masoudi* (Ontario), the charges alleged offences "at the City of Toronto in the Toronto Region and elsewhere in Canada". In *Patrois* (Ontario), the offence was alleged to have taken place "in the province of Ontario and the province of Québec". In *Hammerbeck* (British Columbia), the indictment charged an offence "at the District of Surrey, in the County of Westminster, Province of British Columbia." In *Doer* (Manitoba), the informations alleged the unlawful sale of cigarettes "at or near the Town of St. Adolphe, in the Province of Manitoba." In *Ibeagha* (Quebec), the Indictment alleged that the offences were committed "in Montreal and elsewhere in Canada."

[78] All of the indictments in those cases were being tried in the province or a province (if more than one) where the offences were alleged to have occurred.

[79] The Crown also refers to the case of *R. v. Merrett*, 2017 ABPC 56 in its factum. *Merrett* involved a situation where the Crown had not called evidence on where the offence occurred. The Indictment alleged that it occurred in the province of Alberta. Despite the factual differences, the discussion of jurisdiction

in the case is instructive, as it makes clear that it will be apparent on the face of the indictment where the offence is alleged to have been committed:

> 27 Generally, there are three occasions when the Provincial Court will address the issue of territorial jurisdiction:
>
> > (1)Initially, when the sworn Information is examined, it will be apparent on its face whether it is alleged therein that an offence was committed in the territorial jurisdiction of the Court. If it is alleged that the offence was committed outside the territorial jurisdiction of the Court, and assuming none of the exceptions set out in sections such as 7, 470, and 476, apply, then the Court will have no jurisdiction to "try, determine and adjudge" the proceedings… [emphasis added]

[80] As in *Merrett*, none of the exceptions apply in this case. The Crown, in its factum, suggests that the Indictment in this case is defective on its face:

> 27. The wording of the sexual exploitation charge did allege the offence occurred in New Brunswick. It is clear the trial was being held in Nova Scotia. As a result, the charge was defective on its face.

[81] With respect, the Indictment is not defective on its face. On its face it alleged the offence occurred within the territorial jurisdiction of New Brunswick. It does not allege nor can it be interpreted in such a manner as to confer territorial jurisdiction upon Nova Scotia. If an indictment alleges an offence occurred outside the territorial jurisdiction of the court, and none of the exceptions in the *Criminal Code* apply, the court has no jurisdiction to adjudicate the proceedings.

[82] Neither party has referred to a reported case where a court has assumed territorial jurisdiction over a *Criminal Code* offence which was alleged, by way of the wording of the indictment, to have occurred exclusively in a different province.

[83] In order for the Supreme Court of Nova Scotia to have gained jurisdiction in the present case, the Indictment would have had to have alleged that the s. 153(1)(a) offence occurred in New Brunswick and Nova Scotia.

[84] The Crown argues that to accede to this ground of appeal would be to prefer form over substance. With respect, I disagree. The wording of the indictment is a matter of substance on a question of jurisdiction. The Courts of Nova Scotia do not have jurisdiction to try an indictment charging an offence alleged to have occurred only in New Brunswick. The trial judge’s failure to stay the charge was an error of law.

[85] Ms. Webber argues the failure to stay the charge had a ripple effect on the whole trial proceeding, which requires a new trial. It is not necessary to address this aspect of the argument as I am of the view a new trial should be ordered for other reasons.

[86] I would allow this ground of appeal and enter a judicial stay on Count 7 on the Indictment.

Issue 2: Did the trial judge err in charging the jury on liability as a principal for the offence of advertising contrary to s. 286.4 of the *Criminal Code*?

[87] The Crown, appropriately, has conceded this ground of appeal, so I will only address it briefly.

[88] Section 286.4 of the *Criminal Code* provides:

> Advertising sexual services
>
> 286.4 Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of
>
> > (a) an indictable offence and liable to imprisonment for a term of not more than five years; …

[89] The advertising at issue in this case took place on the Backpage website, where numerous advertisements were posted for M.M.S.'s sexual services.

[90] There was a lack of an evidentiary foundation to justify instructing the jury on criminal liability as a principal for advertising. The evidence presented to the jury could not support the conclusion that Ms. Webber actually posted any of the complainant's Backpage ads. The trial judge instructed as follows:

> I refer you to [M.M.S.]'s evidence that at first Kyle Pellow wrote her Backpages ads because she did not know how to post the advertisements. Her evidence was she learned how to post her ads and then would do so herself. I refer you to [M.M.S.]'s evidence in relation to the posting of the Backpages ads and that she did not give evidence that Renee Webber personally posted any of her ads. I refer you to [M.M.S.]'s cross-examination and her evidence that she did not know if she ever posted an advertisement on Backpages going to Renee Webber's phone number. I refer you to [M.M.S.]'s evidence that she would sometimes post Kyle Pellow's number to ads she would create on Backpages. [Emphasis added]

[91] The *actus reus* for the advertising offence under s. 286.4 is made out if an accused advertised and offered to provide sexual services for consideration. The *mens rea* is made out if the accused intended to advertise the offer and knew it was an offer to provide sexual services for consideration. As the Ontario Court of Appeal explained in *R. v. Gallone*, 2019 ONCA 663:

> 77 When Parliament enacted s. 286.4 in 2014, pursuant to Bill C-36, it created an entirely new offence prohibiting the advertising of an offer to provide sexual services for consideration. Section 286.4 provides:
>
> > Everyone who knowingly advertises an offer to provide sexual services for consideration is guilty of [a hybrid offence].
>
> 78 The *actus reus* of this offence is made out if the accused advertised an offer to provide sexual services for consideration. The *mens rea* is made out if: (i) the accused intended to advertise the offer; and (ii) the accused knew that the offer was one to provide sexual services for consideration.

[92] There was evidence that some of Ms. Webber's photos were included in the advertisements offering M.M.S.'s sexual services. There was also evidence Ms. Webber encouraged M.M.S. to keep posting her ads. However, the prosecution never relied on abetting to establish criminal liability. On appeal, the Crown acknowledges there was no evidence that Ms. Webber actually posted the advertisements offering to provide M.M.S.'s sexual services for consideration. In other words, there was no evidence Ms. Webber committed the *actus reus* of the advertising offence as a principal. The trial judge erred when she instructed the jury that the appellant could be guilty of the advertising offence as a principal.

[93] As a result, I would allow this ground of appeal, set aside the conviction and order a new trial on Count 1 on the Indictment.

Issue 3: Did the trial judge err in denying the defence application under s. 276 of the *Criminal Code*?

[94] During the cross-examination of M.M.S., defence counsel informed the court that he planned to ask M.M.S. about a relationship between herself and Mr. Pellow.

[95] He argued that a s. 276 application was not necessary as he only sought to adduce the evidence in relation to the exercise of control over her. He explained the evidence was not on the issue of consent. The Crown took the position that a s. 276 application was necessary under the circumstances.

[96] The trial judge concluded that s. 276 was applicable and that the defence would have to make an application under that section.

[97] The written s. 276 application identified the evidence sought to be adduced as follows:

> Between October 1, 2015 and May 22, 2016 [M.M.S.] engaged in sexual activity in Halifax, Nova Scotia, with Kyle Leslie Pellow, which was exploitative.

[98] The relevance was also identified in the application as follows:

> The defence will be asserting that Kyle Leslie Pellow subjected [M.M.S.] to control, direction or influence in part by the instrumentality of his exploitative sexual behaviour.

[99] The defence evidence arose out of M.M.S.'s testimony at the preliminary inquiry and was described by the trial judge as follows:

> [30] The affidavit submitted in this case is an "information and belief" affidavit sworn by counsel. The affidavit references evidence given by the complainant at the preliminary inquiry relating to the accused and the then co-accused, Mr. Pellow. At the preliminary inquiry, [M.M.S.] stated that prior to engaging in underage sex work, she engaged in sexual activity with Kyle Pellow in a vehicle, and later, after her forced participation in underage sex work began, the allegation is Mr. Pellow sexually assaulted her.

[100] The defence made it clear the evidence sought to be adduced was for a strictly limited purpose – whether it was Mr. Pellow or Ms. Webber who was exercising control over M.M.S. The defence brief states:

> The evidence of prior sexual activity here relates to a strictly limited issue – whether it was Kyle Leslie Pellow or Renee Allison Webber who was exercising any control, influence or direction over [M.M.S.] during the timeframe covered by the Indictment.

[101] Defence counsel specifically stated that Ms. Webber would not be advancing consent as a defence to the ss. 271 and 153(1)(a) charges (the offences alleged to have occurred in Moncton). Defence counsel also stressed that the proposed evidence was not being introduced to support either of the impermissible inferences:

> It should be noted that the proposed evidence in no way supports either of the impermissible inferences: either that [M.M.S.] was *more likely* to have consented

> when she says that the attack occurred, or that the Moncton sexual assaults occurred; nor that she is less worthy of belief because of the "sexual nature of the activity" with Mr. Pellow: 276(1).

[102] The trial judge denied the s. 276 application (*R. v. Webber*, 2018 NSSC 344). She found the proposed evidence lacked probative value and engaged the second twin myth (the complainant being less worthy of belief). She explained:

> [66] I have concluded the proposed evidence is not significantly probative. It is difficult to understand how the alleged sexual assault by Mr. Pellow, or the kiss, could raise a reasonable doubt as to the accused's control over M.S. In addition, I have real concern that the evidence engages one of the twin myths, that by reason of the sexual nature of the activity, the complainant is less worthy of belief. That is, by accepting that a sexual assault occurred at the hands of Mr. Pellow, and that the sexual assault was indicative of control by Mr. Pellow, M.S. is less likely of belief in relation to her evidence that she was also controlled by the accused.
>
> …
>
> [76] There has been no explanation how an act of violence by another could raise a reasonable doubt concerning the accused's guilt in relation to the charged offences. There was no satisfactory explanation connecting the two.

[103] In reaching this conclusion, the trial judge acknowledged the defence's willingness to try to minimize any concerns stemming from the evidence by limiting the scope of the cross-examination. She held, nevertheless, it "does not affect my relevance analysis." She stated:

> [72] The concern is that the evidence of a sexual assault by Mr. Pellow, while not explicitly offered to suggest that M.S. is less worthy of belief, is implicitly offered to draw that conclusion. The proposition is that because of the sexual assault, Mr. Pellow had control over the complainant and therefore, when M.S. says the accused had control as well, she is less worthy of belief in relation to that allegation.

[104] Respectfully, the trial judge's s. 276 decision is in error.

[105] Contrary to the trial judge's reasoning, the evidence in this case was tendered to support a legitimate defence inference, not the prohibited credibility myth under s. 276(1)(b).

[106] One of the core issues at Ms. Webber's trial was who exercised control, influence or direction over the complainant. The jury was instructed that control, influence, and direction over the complainant were constituent elements of the offences of procuring under s. 286.3(2), trafficking a person under 18 contrary to s.

279.011(1), and receiving a material benefit from said trafficking contrary to s. 279.02. The trial judge also directed the jury to consider evidence of control, direction and influence as relevant to the existence of an exploitative relationship under s. 153(1)(a).

[107] Ms. Webber's defence to these accusations was twofold: (1) she denied the accusations against her, and (2) she alleged her former co-accused, Kyle Pellow, was the real perpetrator. The theory of the defence was made clear before the Jury:

> Rather than being a co-participant in the business of promoting the sexual services of an underage girl, Renee Webber was and remains a co-victim of Mr. Pellow's emotionally and financially manipulative behaviour.

[108] The defence sought to tender the evidence to show that it was Mr. Pellow who exercised control, influence or direction over the complainant, not Ms. Webber. As defence counsel explained to the trial judge:

> …The Crown has led evidence from this particular witness already at this trial, on repeated occasions that Kyle Pellow and Renee Webber presented themselves and acted as a team in terms of controlling and influencing her movements, and this is an incident which counters that narrative being an act of Kyle Pellow alone.

[109] If believed, the s. 276 evidence was probative of the issue of control. It could have established that Mr. Pellow exercised control, influence or direction over the complainant by way of sexual violence and/or intimidation, and it could also establish that he did so separate and apart from Ms. Webber.

[110] Respectfully, the trial judge's reasoning at paragraph 72 of her decision reflects a misunderstanding as to the scope and bounds of what is permissible under s. 276.

[111] Historically, the prohibition against the second myth in section 276(1)(b) was targeted at the false idea that "unchaste women" are less likely of belief (*R. v. Barton*, 2019 SCC 33, at ¶ 56).

[112] It prohibited the use of otherwise irrelevant/immaterial evidence of prior sexual activity to attack the general credibility of the complainant. Such an inference is properly prohibited for its archaic, false, and prejudicial reasoning.

[113] The more modern understanding of the second myth is broader, and is no longer limited to inferences arising from a lack of chastity. Evidence of a complainant's prior sexual activity is inadmissible to suggest that they are less

worthy of belief, regardless of whether such sexual activity accords with current social mores. The Court in *R. v. Goldfinch*, 2019 SCC 38, explained:

> 45. … However, this Court has held that the second myth is not limited to attitudes towards "unchaste" women (*Darrach*, at para. 33). Moreover, while sexual activity generally carries less stigma than it once did, complainants continue to be treated as less deserving of belief based on their previous sexual conduct. The notion that some complainants "invite" assault and, by inference, do not deserve protection persists both inside and outside our courtrooms…

[114] However, s. 276 does not create a total bar to the admission of sexual history evidence. The provision remains targeted at the two prohibited myths listed under s. 276(1)(a) and (b).

[115] As recently discussed in *R. v. R.V.*, 2019 SCC 41, it is legally permissible for the defence to use sexual history evidence to rebut material elements of the prosecution's case. In *R.V.*, the prosecution led evidence suggesting that the complainant's pregnancy arose from the sexual assault at issue. The defence sought leave under s. 276 to cross-examine the complainant on other sexual activities which might alternatively explain the pregnancy. Justice Karakatsanis reasoned:

> 44. Section 276(1) sets out an absolute bar against introducing evidence for the purpose of drawing twin-myth inferences. Here, R.V.'s request to challenge the inference that the pregnancy resulted from the alleged assault did not engage the twin myths. As such, the application judge correctly concluded that the cross-examination was not barred by s. 276(1).
>
> …
>
> 53. R.V. sought to cross-examine the complainant on a specific instance of sexual activity -- the activity that caused her pregnancy -- evidence of which was introduced by the Crown. The pregnancy itself demonstrated only that sexual activity capable of impregnating the complainant took place around July 1st. The existence of such activity was not speculative. But the fact of pregnancy here did not reveal exactly when or with whom that sexual activity occurred. The proposed cross-examination was directed at challenging the inference that R.V. caused the pregnancy.
>
> 54. During oral arguments before this Court, Crown counsel submitted that a bare denial cannot satisfy the "specific instances" requirement. However, this submission turns the presumption of innocence on its head. The Crown's assertion that the pregnancy arose from the sexual activity that formed the subject-matter of the charge cannot prevent the accused from leading evidence to suggest that the pregnancy was caused by someone else or by some other sexual act. The

> presumption of innocence requires that R.V. be allowed to challenge the Crown's evidence that he committed a sexual assault. Of course, the trier of fact may ultimately reject the accused's denial. But, as Paciocco J.A. emphasized, it would be unfair for the Crown to rely on the complainant's testimony that the accused caused the pregnancy while at the same time preventing the accused from challenging the complainant's account.

[116] The same rationale applies here. Ms. Webber sought to challenge the Crown's assertion that she exercised control, influence or direction over the complainant. This was a valid evidential purpose which was directly relevant to Ms. Webber's defence.

[117] Again returning to Justice Karakatsanis' reasoning in *R.V.*, she makes the point that evidence tendered to rebut the Crown-led evidence is admissible:

> 56. The accused's s. 276 application must also identify the relevance of the evidence to be adduced. As a matter of logic, evidence tendered to rebut Crown-led evidence implicating the accused will be relevant to the accused's defence. As noted above, even in the 1982 iteration of s. 276, Parliament carved out an exception for evidence rebutting Crown-led evidence of the complainant's sexual activity or absence thereof.

[118] Recent s. 276 case law in the context of procuring/human trafficking further supports this position. In *R. v. Downey*, 2018 ONSC 6347, the accused sought leave under s. 276 to cross-examine the complainant in relation to her motives for coming to Sudbury (where the procuring/sex-work allegedly occurred) and her prior knowledge of using websites to advertise escort services. The trial judge concluded that such cross-examination was permissible to challenge the complainant's version of events:

> [58] I agree with the applicants' position that to deprive them of the right to cross-examine the complainant on the advertisement would strip them of the ability to address the complainant's version of the events with direct evidence.
>
> …
>
> [60] The applicants' position at trial will be that the complainant came willingly to Sudbury for the explicit purpose of sex work, just as the Crown alleges the applicant Kelly-Ann Downey did, and that she was not tricked into it by the applicant Sherlock Downey.
>
> [61] It would be unfair and a deprivation of the right to make full answer and defence to permit the Crown on the one hand to say that the complainant was lured or tricked into attending Sudbury, and that the Applicants posted the advertisements without the complainant's consent, without, on the other hand,

> allowing the cross-examination of the complainant on the existence of advertisements which could directly contradict her testimony about her knowledge of the websites in question. [Emphasis added]

[119] In the present case, the s. 276 evidence at issue was relevant to the question of control over the complainant. As in *R.V.* and *Downey*, that material issue speaks to a legitimate line of defence reasoning separate and apart from the twin myths. It was permissible for Ms. Webber to call evidence to support her defence by suggesting that the complainant was not being truthful in relation to the control allegation. To hold otherwise would immunize the complainant's evidence from challenge on an essential element of the offence(s). Section 276 was never intended to preclude such evidence.

[120] I am also of the view the trial judge erred in concluding the evidence was not sufficiently probative:

> [66] I have concluded the proposed evidence is not significantly probative. It is difficult to understand how the alleged sexual assault by Mr. Pellow, or the kiss, could raise a reasonable doubt as to the accused's control over M.S. …

[121] The proposed defence evidence had high probative value on the issue of control.

[122] As Karakatsanis J. explained in *R.V.*:

> 62. …Because the answers [to the defence cross-examination questions] had the potential to undermine or confirm important Crown evidence, their probative value was high.

[123] The Crown argues that though the evidence may have been probative of whether Mr. Pellow exercised control over M.M.S., his exercise of control did not prevent Ms. Webber from also having the opportunity to exercise control, direction or influence over her.

[124] I disagree. The s. 276 evidence was unique, because it addressed a form of violent physical/sexual/emotional control.

[125] The proposed evidence under s. 276 offered an example of Mr. Pellow controlling the complainant in Halifax. As defence counsel explained:

> And this is further evidence of perhaps more extreme and more intimate -- an instrument of control by sexual abuse in Halifax by Kyle Pellow alone that the jury will, if they know about it, they will appreciate that Renee Webber can't be

> linked to that, and the jury could evaluate that as significant in terms of whether or not Renee Webber, which is the ultimate issue before them, whether Renee Webber was exercising control, direction or influence over [M.M.S.], or whether the effective control was with Kyle Pellow because of these very extreme kind of behaviours towards her. [Emphasis added]

[126] Had the s. 276 application succeeded, Ms. Webber could have argued that Mr. Pellow was sexually/violently controlling of the complainant, in the absence of Ms. Webber.

[127] The Crown's position that the proposed evidence was not significantly probative of the control issue is at odds with its submission to the jury. Once the proposed defence evidence was ruled inadmissible, the Crown twice suggested to the jury during closing submissions that evidence of sexual violence was qualitatively unique and highly probative on the issue of control. The Crown pointed to the alleged sexual contact between Ms. Webber, M.M.S., and Kyle Pellow in Moncton, New Brunswick, and stated:

> The Crown submits to you that on the final weekend in Moncton, in that hotel room, Renee Webber and Kyle Pellow exercised the ultimate form of control over [M.M.S.]. The Crown says that they both touched her for a sexual purpose in that hotel room in Moncton. And the Crown submits to you that they did so while both of them were in an exploitive relationship with [M.M.S.] because of their involvement with controlling and directing her movements as an underage prostitute. [Emphasis added]

[128] The Crown repeated: "…this sexual act was the ultimate expression of Renee Webber and Kyle Pellow's control over [M.M.S.]"

[129] It is difficult to reconcile the Crown's position that on one hand the s. 276 evidence was not significantly probative of control by Kyle Pellow and then, on the other, its argument before the jury that other allegations of sexual impropriety were the "ultimate form" or "ultimate expression" of control by Ms. Webber.

[130] The right to make full answer and defence requires that an accused be permitted to respond to prosecutorial allegations.

[131] Finally, the trial judge erred when she found that the impermissible thinking could "seep into the jury" and not be cured by a limiting instruction. In her oral decision, she said:

> And in particular, that by accepting a sexual assault occurred by Mr. Pellow and was an indicia of control by Kyle Pellow, [M.M.S.] is less likely of belief in

> relation to her evidence of control by Ms. Webber. I'm concerned that that impermissible thinking could seep into the jury, particularly at this stage, and could not be cured by a limiting instruction.

[132] In *R. v. Corbett*, [1988] 1 S.C.R. 670, Chief Justice Dickson urged trial judges to trust the good sense of the jury and give them all relevant information:

> 35. In my view, the best way to balance and alleviate these risks is to give the jury all the information, but at the same time give a clear direction as to the limited use they are to make of such information. Rules which put blinders over the eyes of the trier of fact should be avoided except as a last resort. It is preferable to trust the good sense of the jury and to give the jury all relevant information, so long as it is accompanied by a clear instruction in law from the trial judge regarding the extent of its probative value.

[133] The presumed efficacy of such a s. 276 jury instruction should also be factored into a trial judge's admissibility analysis, to the benefit of the accused. As Justice Doherty explained in *R. v. L.S.*, 2017 ONCA 685:

> [96] The risk of juror misuse of evidence of other sexual activity is taken into account by the scheme established under s. 276. Section 276.4 requires that when a trial judge admits evidence of other sexual activity, she must "instruct the jury as to the uses that the jury may and may not make of the evidence". Any consideration of the potential prejudice under s. 276(2) (c) premised on the potential misuse of the evidence by the jurors must take into account that the jurors will be properly instructed in compliance with s. 276.4. [Emphasis added]

[134] The trial judge's reasoning did not recognize the curative effect of a jury caution in relation to the proposed evidence, nor did she consider this factor in her s. 276 analysis.

[135] The proposed evidence should have been admitted in this case. The defence's cross-examination of the complainant was improperly and unlawfully fettered, thereby impacting Ms. Webber's right to make full answer and defence. The appropriate remedy is to order a new trial on the remaining charges, Counts 3, 4 and 5 on the Indictment. As such, it is not necessary to address the other grounds of appeal or the cross-appeal.

Conclusion

[136] The appeal is allowed. I would order a new trial on Counts 1, 3, 4 and 5, and enter a judicial stay on Count 7 of the Indictment.

Farrar, J.A.

Concurred in:

Beveridge, J.A.

Beaton, J.A.