

CASE NO. VOL. NO. PAGE
Cite as: R. v. A.M.P., 1999 NSCA 166

A. M. P. **HER MAJESTY THE QUEEN**
(Appellant) - and - (Respondent)

C.A.C. No. 151954 Halifax, N.S. **PUGSLEY, J.A.**

Editorial Notice

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APPEAL HEARD: April 1, 1999

JUDGMENT DELIVERED: August 6, 1999

SUBJECT: **Criminal Law. S. 276 of the *Criminal Code* - Admissibility of Evidence Re Previous Sexual Encounter Between the Complainant and the Accused**

SUMMARY: The accused appeals from his conviction by a jury that he committed a sexual assault on the female complainant contrary to s. 271 of the **Criminal Code**. The trial judge ruled on a s.276 application that evidence of prior sexual activity between the complainant, and the accused, was inadmissible.

The evidence, he determined, was not relevant to the issue of honest, but mistaken, belief in consent as the prior sexual activity was not sufficiently proximate in time, did not have significant probative value to the issue, and "may prejudice the complainant and the proper administration of justice".

By permitting counsel for the accused to address questions to the complainant, to a prospective witness, and to the accused, if called, respecting a conversation between the complainant and the accused, which referred to the previous sexual encounter, the trial judge concluded that the accused would have an opportunity to make full answer and defence.

RESULT: Appeal dismissed. 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.

The burden rests on the party seeking to introduce the evidence and the standard is on a balance of probabilities.

The Crown acknowledged that the accused had met the burden under s. 276(2)(a).

With respect to s. 276(2)(b), the trial judge erred when he concluded that the evidence of the previous sexual encounter was not relevant. The circumstances surrounding the two encounters, as well as the complainant's evidence respecting the second encounter, established the relevance. The time interval of four to six weeks between the two encounters was not significant, in the circumstances.

With respect to s. 276(2)(c), however, the trial judge, was quite correct when he concluded that the previous sexual encounter had no significant probative value to the defence raised by the accused. Accordingly, the appellant failed to meet the burden imposed under this section. The trial judge also took fair and reasonable steps to ensure the accused had an opportunity to make full answer and defence.

This information sheet does not form part of the court's decision. Quotes must be from the decision, not this cover sheet. The full court decision consists of 27 pages.