IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. J.W.S., 2012 NSPC 101

Date: May 22, 2012

Docket: 2311709 - 2311713

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

J. W. S.

DECISION ON SECTION 276 APPLICATION

Editorial Notice

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

JUDGE: The Honourable Anne S. Derrick

HEARD: February 6 and April 20, 2012

DECISION: May 22, 2012

CHARGES: sections 271(1); 267(b); 267(a); 264.1(1)(a) and 88(1)of the *Criminal Code*

COUNSEL: Susan MacKay, for the Crown

DEFENCE: Victor Goldberg, Q.C., for the Defence, with Sean Farmer, Articling Clerk

By the Court:

Introduction

[1] J. S. is charged with sexual assault, assault causing bodily harm, threats and possession of a knife for a purpose dangerous to the public peace or for the purpose of committing an offence. These offences are alleged to have occurred on May 6, 2011. Mr. S. is scheduled for trial on September 5, 6, 7 and 10, 2012.

[2] Mr. S. is seeking to have evidence about his sexual relationship with the complainant admitted into evidence at his trial. The admissibility of such evidence is dealt with according to the procedural and substantive requirements of section 276 of the *Criminal Code*.

[3] Section 276.2(3) requires that the judge making the determination about the admissibility of the sexual activity evidence to provide reasons. These are my reasons with respect to Mr. S.'s application.

Procedure in a section 276 (Sexual Activity) Application – The Threshold Issue: Is the Evidence "Capable of Being Admissible"?

[4] The *Criminal Code* is very specific about what evidence of sexual activity by the complainant is admissible in a sexual assault trial. Section 276(2) provides that 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 basis of the subject-matter of the charge, unless there is a judicial determination 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.

[5] Section 276 of the Criminal Code "excludes all discriminatory generalizations about a complainant's disposition or about her credibility based on the sexual nature of her past sexual activity on the grounds that these are improper lines of reasoning." *(R. v. Darrah, [2000] S.C.J. No. 46, paragraph 34)*

[6] A sexual activity application by an accused involves the threshold question of whether the evidence in issue is "capable of being admissible under subsection

276(2)" of the *Criminal Code*. Mr. Goldberg for Mr. S. complied with the requirements of *Criminal Code* section 276.1 by filing a Notice of Application, his affidavit, and a legal brief. At the hearing held on February 6, 2012, the Crown conceded, on the basis of the Defence affidavit and brief, that the evidence Mr. S. is seeking to have admitted is "capable of being admissible."

[7] The threshold "capable of admissibility" stage of section 276 proceedings

> …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…unless such evidence clearly appears to be incapable of being admissible, having regard for the criteria of subs. 276(2) and the indicia of subs. 276(3), the judge should proceed to the evidentiary hearing stage. *(R. v. Ecker, [1995] S.J. No. 53, (C.A.), paragraph 61)*

[8] At the February 6 hearing, I accepted that the evidence of the prior sexual activity between Mr. S. and the complainant met the threshold requirement of being capable of admissibility. I was satisfied that on its face, the evidence satisfies what the *Criminal Code* mandates: that it involves specific instances of sexual activity, has relevance to issues at trial, and is of significant probative value that is apparently not substantially outweighed by the danger of prejudice to the proper administration of justice. More will be said about these section 276(2) requirements later in these reasons.

Procedure in a section 276 (Sexual Activity) Application – Determination of Ultimate Admissibility

[9] On February 6 a further hearing was scheduled for April 20 to enable the parties to address the issue of ultimate admissibility of the sexual activity evidence. The Crown filed a summary of its case and Mr. Goldberg filed an affidavit from Mr. S. and written submissions to augment his submissions for the February 6 hearing. The Crown elected not to cross-examine Mr. S. on his affidavit. In the case of this application, I do not think anything would have been added by cross-examination. The parties provided in their filed materials all the information I need for my decision.

[10] The Crown's summary of the facts it is alleging sets out the following: Mr. S. and the complainant had been dating for several months. On May 6 at about 4 a.m., Mr. S. came to the complainant's apartment. He was irate and intoxicated. He demanded to be let in and the complainant eventually complied. They went into the complainant's bedroom and continued an argument that had started over the phone earlier that night. Mr. S. got a knife from the kitchen and threatened to kill the complainant. He pushed her onto the bed, ripped off her nightclothes, bit her arm, face and chest and forced vaginal intercourse on her without her consent. Mr. S. did not ejaculate. The complainant called the police after he fell asleep.

[11] The Crown will be seeking to prove that the complainant did not consent to the sexual activity or to Mr. S. harming her in any way and further notes that in law the complainant could not consent to bodily harm.

[12] In his affidavit, Mr. S. said the following: that his relationship with the complainant had begun on or about February 14, 2011; that during the relationship he and the complainant engaged in consensual sexual activity usually every day; that the sexual activity sometimes occurred when he and/or the complainant were under the influence of alcohol; that he and the complainant would bite each other during the regular course of sexual activity and the biting would intensify when they would have sex following a disagreement; that he and the complainant engaged in "make-up" sex following disagreements, including on an occasion on or about the end of April 2011; that he and the complainant would usually communicate by physical rather than verbal signals; and that he and the complainant engaged in sexual activity the day before May 6, 2011.

[13] The issues that Mr. S. says the sexual activity evidence is relevant to are consent and an honest but mistaken belief in consent.

[14] The Crown's position on Mr. S.'s application is summarized in its written submissions: "…in light of the specific allegations raised by the defence in this application and the possible defences (or partial defences) to which such allegations might give rise…the accused properly should be permitted in his defence to canvass evidence of the nature of the alleged prior sexual relationship between himself and [the complainant.]" *(Written submissions of the Crown dated April 17, 2012)*

Legal Principles that Govern Admissibility of the Evidence

[15] Even though the Crown concedes that the prior sexual activity evidence is admissible as it is relevant to the issues of consent and honest but mistaken belief in consent, section 276.2(3) requires that the judge determine the admissibility issue in accordance with section 276(2). I am satisfied on the basis of Mr. S.'s affidavit and the submissions by Mr. Goldberg, and having reviewed the Crown's factual summary, that the evidence of prior sexual activity with the complainant complies with the requirements of section 276(2) in that it (a) is of specific instances of sexual activity; (b) is relevant to the trial issues of consent and honest but mistaken belief in consent; and (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[16] In determining the issue of admissibility I am required to take into account the factors that are listed in section 276(3) of the *Criminal Code*. Certain of these factors are concerned with prohibiting the discreditable use that has historically been made of sexual activity evidence in sexual assault trials. The *Criminal Code* is explicit: such evidence is not admissible to support the "twin myths"; the inferences that complainants with a sexual history are (a) more likely to have consented to the sexual activity that forms the subject-matter of the charge; or (b) are less worthy of belief. *(R. v. Seaboyer, [1991] S.C.J. No. 62; section 276(1), Criminal Code)* As McLauglin, J. (as she then was) found in *Seaboyer*, these twin myths "are now discredited. The fact that a woman has had intercourse on other occasions does not in itself increase the logical probability that she consented to intercourse with the accused. Nor does it make her a liar." *(paragraph 23)*

[17] The judgments in *Seaboyer*, particularly that of L'Heureux-Dube, J., dissenting in the result, discussed extensively how the "twin myths" have had a pernicious effect on the equality and privacy rights of complainants in sexual assault cases. *(see, for example, paragraphs 140 – 141)* L'Heureux-Dube, J. described the breadth of the damaging stereotypes:

> …that men who assault are not like normal men; the "mad rapist" myth; that women often provoke or precipitate sexual assault; that women are assaulted by strangers; that women often agree to have sex but later complain of rape; and the related myth that men are often convicted on the false testimony of the complainant; that women are likely to commit sexual assault as are men and that when women say no they do not necessarily mean no. This baggage belongs to us all. *(paragraph 153)*

[18] Section 276(3) has recognized the harm caused by these widespread stereotypes and myths by emphasizing a number of societal and criminal justice objectives: society's interest in encouraging the reporting of sexual assault offences; the need to remove from the fact-finding process any discriminatory belief or bias; the risk the evidence may unduly arose sentiments of prejudice, sympathy or hostility in the jury; the potential prejudice to the complainant's personal dignity and right of privacy; and the right of the complainant and of every individual to personal security and the full protection and benefit of the law. *(sections 276(3)(b),(d),(e),(f),(g))* The judicial determination of admissibility of sexual activity evidence must take these legislated objectives into account. *(section 276.2(3))*

[19] The judge determining admissibility of sexual activity evidence must be satisfied that the admission of the evidence will not compromise the objectives I have just described. Furthermore, the judge must be satisfied that the evidence will serve the interests of justice, including the right of the accused to make a full answer and defence, and that it offers a reasonable prospect of assisting in a just determination of the case. *(sections 276(3)(a), (c))*

[20] The issues of consent and, potentially, honest but mistaken belief in consent, will have to be canvassed in determining whether the Crown is able to prove the charge of sexual assault against Mr. S. beyond a reasonable doubt. In its prosecution of Mr. S., the Crown must not only prove the *actus reus* of the offence of sexual assault beyond a reasonable doubt – that the complainant did not voluntarily agree to engage in the sexual acts but also the *mens rea* of the offence - that Mr. S. knew of or was reckless or willfully blind to the lack of consent on the part of the complainant. *(R. v. Ewanchuk, [1999] S.C.J. No. 10, paragraph 23)*

[21] If the Crown proves lack of consent, then there will be an evidential burden on Mr. S. to show that he had an honest mistaken belief in consent. The evidential burden resting on the accused requires him to point to evidence or to adduce evidence on the basis of which a reasonable jury [trier of fact] properly instructed could acquit. Once he meets the evidential burden in relation to a mistaken belief in consent, the Crown bears the persuasive burden to disprove this defence. *(R. v. Ewanchuk, [1999] S.C.J. No. 10, paragraphs 44, 46, 55; R. v. Esau, [1997] S.C.J. No. 71; R. v. Osolin, [1993] S.C.J. No. 135)*

[22] An accused is not entitled to have reached any conclusions he wished, in forming his honest but mistaken belief in consent. For policy reasons he is limited by the provisions of 273.1 and 273.2 of the *Criminal Code*. These sections provide that no consent is obtained where, *inter alia*, the complainant expresses, by words or conduct, a lack of agreement to engage in the activity, or having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity. Section 273.2 establishes that it is not a defence to a charge of sexual assault that the complainant consented to the activity that forms the subject-matter of the charge, where, the accused's belief arose from his (i) self-induced intoxication; (ii) recklessness or willful blindness; or (iii) the accused did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.

[23] Mr. Goldberg has submitted that if the sexual activity evidence is not admitted then the Court will be prevented from understanding "the circumstances known to [Mr. S.] at the time" which would severely restrict "the Court's ability to assess the reasonableness of steps taken [by Mr. S.] to ascertain consent and would disproportionately override his right to full answer and defence." *(Written submissions of the Defence dated April 19, 2012)* I note that prior sexual activity evidence is "most often used to substantiate claims of honest but mistaken belief in consent." *(Darrah, paragraph 59)*

[24] As I have indicated, I am satisfied that the prior sexual activity evidence is admissible in Mr. S.'s trial. It meets the requirements of section 276(2) of the *Criminal Code*. It is evidence of specific instances of sexual activity, instances of sexual activity between Mr. S. and the complainant. The Defence is not proposing to elicit evidence through cross-examination of the complainant with respect to

general reputation. That would be prohibited. *(section 277, Criminal Code; Seaboyer, paragraph 76; R. v. B.B., [2009] O.J. No. 862 (S.C.J.), paragraph 16)* The evidence is relevant to trial issues, notably honest, mistaken belief in consent, and is not evidence of "trifling" probative value that would "endanger the proper administration of justice." *(Darrah, paragraph 41)*

[25] The admission of the prior sexual activity evidence satisfies the concerns expressed by the majority in *Seaboyer*, that the evidence may be important for "determining whether the accused is guilty or innocent under the law – the ultimate aim of the trial process." *(Seaboyer, paragraph 54)* I find that admitting the evidence does not undermine the legislated objectives in section 276(3) that are intended to support the equality and privacy rights of complainants and promote the proper administration of justice. The Crown did not take the position that the evidence should be excluded due to the potential prejudice to the complainant's personal dignity and right of privacy or its effect on the right of the complainant to personal security and to the full protection and benefit of the law *(ss. 276(3)(f) and (g))*. This evidence is not without dignity and privacy implications for the complainant, but these considerations do not prevail given the relevance of this evidence to pivotal trial issues. As I have indicated, there is a reasonable prospect that the evidence will assist me in arriving at a just determination in this case with the accused being afforded a full answer and defence to the charge of sexual assault.

[26] But admitting the evidence does not eliminate the role of judicial discretion in regulating the questioning of the complainant at trial. The sexual activity evidence cannot be misused for irrelevant and misleading purposes; its use must be to provide the accused "the tools with which to build a legitimate defence." *(Seaboyer, paragraph 75)*

[27] I will repeat here what section 276(1) prohibits: sexual activity evidence is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented or is less worthy of belief. In *Darrah*, the Supreme Court of Canada held that:

> **35** The phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant

> features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted. The phrase "by reason of the sexual nature of that activity" has the same effect as the qualification "solely to support the inference" in Seaboyer in that it limits the exclusion of evidence to that used to invoke the "twin myths".

[28] As the Crown has noted, counsel and the Court must "be alive" to the potential for misuse of sexual activity evidence. *(Written submissions of the Crown dated April 17, 2012)*

The "Jobidon" Issue

[29] The issue of the complainant's consent to the biting that led to the assault causing bodily harm charge also arose in the course of the section 276 application. The Defence has submitted that there will be evidence of biting as part of "a consensual pattern of behaviour" and "a form of expression in the relationship." In the Defence submission: "If there was actual consent or honest but mistaken belief in consent to the biting, the criminal element will be lacking on these facts." *(Written submissions of the Defence dated April 19, 2012)* The Defence states that the Crown must prove that Mr. S. intended to cause bodily harm to the complainant. The Crown has indicated it reserves the right to address this issue - also being referred to as "the *Jobidon* issue" *(R. v. Jobidon, [1991] S.C.J. No. 65)* - which held that consent to bodily harm is prohibited on policy grounds with the exception of certain very specific circumstances. I do not intend to resolve this issue now. It will have to be addressed in the context of the evidence admitted at trial.