PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v W.H.D*, 2018 NSPC 29

Date: 20180717
Docket: 8136670, 8136771
Registry: Halifax

Between:

Her Majesty the Queen

v

W.H.D.

Restrictions on Publication:
Pursuant to *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 486.4 [*Identity of the Complainant*]

Pursuant to *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 276.3 [*Contents of the Application*]

DECISION ON APPLICATION PURSUANT TO CRIMINAL CODE S. 276

Judge:	The Honourable Judge Ann Marie Simmons
Heard:	May 10, 2018, in Halifax, Nova Scotia
Decision:	July 17, 2018
Charges:	Section 271
Counsel:	Sarah Kirby, for the Crown Luke Craggs, and Peter Planetta, for the Defence

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***Criminal Code*, Section 276.3 (1)** No person shall publish in any document, or broadcast or transmit in any way, any of the following:

(a) the contents of an application made under section 276.1;

(b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2;

(c) the decision of a judge or justice under subsection 276.1(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted; and

(d) the determination made and the reasons provided under section 276.2, unless

(i) that determination is that evidence is admissible, or

(ii) the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

***Criminal Code*, Section 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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 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).

By the Court

Introduction

[1] W.H.D. is charged that he did, on the 31st of December, 2014, commit two offences upon A.M.Y. Specifically, the offences of sexual assault contrary to s. 271 of the *Criminal Code*, and assault, contrary to s. 266 of the *Criminal Code*. As required by section 276, he served notice upon the Crown and the Court of his intention to seek leave to introduce evidence at trial concerning sexual activity of the complainant other than the sexual activity that is the subject matter of the s. 271 charge before the court.

[2] On May 9, 2018 I granted W.H.D.'s application pursuant to s. 276.1 seeking leave to hold a hearing in order to determine whether the evidence is admissible. The s. 276.2 Application was heard on May 10, 2018. In accord with the requirements of s. 276.2, the public was excluded from the courtroom during the course of the hearings. These are my reasons.

[3] In order to put this Application in context, it is helpful to consider the elements of the offence of sexual assault. The Supreme Court of Canada's 1999 decision in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, defines the elements of this general intent offence. The *actus reus* involves:

a) A voluntary touching;
b) Committed in circumstances of a sexual nature, such that the sexual integrity of the complainant is violated; and
c) The absence of the consent of the complainant.

[4] The m*ens rea* of sexual assault involves:

a) An intention to touch; and
b) Actual knowledge, recklessness or wilful blindness as to a lack of consent, either by words or actions, from the person being touched.

[5] Recklessness means that the accused was aware of the risk that there was an absence of consent, but continued despite the risk. Wilful blindness means that the accused suspected that there was an absence of consent, but deliberately chose not to make inquiries, for fear of confirming that suspicion.

[6] W.H.D. asserts that in defence of the charge of sexual assault he wishes to adduce evidence of prior sexual activity of the complainant. The *Criminal Code* prohibits him from doing so by virtue of s. 276. In short, there is an absolute prohibition against adducing such evidence where it is elicited for an improper purpose, and on any other basis, the admissibility of such evidence is dealt with according to the procedural and substantive requirements of s. 276.

[7] W.H.D. has the burden of establishing, on a balance of probabilities, that the evidence is relevant to an issue in the trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the administration of justice.

Legislative Framework

[8] Section 276 prohibits the use of evidence of past sexual activity when it is offered in support of two specific, illegitimate inferences. These are known as the “twin myths”, namely

that a complainant is more likely to have consented or that she is less worthy of belief by reason of the sexual nature of the activity. As the Supreme Court of Canada explained in *R. v. Darrach,* 2000 SCC 46, the section is not a "blanket exclusion", rather it effects a rule which excludes irrelevant evidence offered in support of illegitimate inferences (at para. 32).

[9] Section 276(1) provides that:

> In proceedings in respect of an offence under section 151, 152, 153, 153.1, 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
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> 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.

[10] The procedural framework is established in subsection 276(2):

> (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.

[11] Subsection 276(3) enumerates the factors a judge must consider when hearing such an application:

> (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 in 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.

[12] Finally, subsection 276.2(3) mandates the way in which the judge hearing such an application will provide reasons. I am required to provide reasons for the determination on admissibility of the proffered evidence. Whether the evidence is admitted in whole or in part, my reasons must identify the evidence that is to be admitted, explain the manner in which the evidence is expected to be relevant to an issue at trial, and I must identify the factors referred to in subsection 276(3) that affected my determination.

Issues

[13] The accused's application is premised upon s. 276(2) which establishes the basis upon which sexual activity evidence may be admitted at trial. The evidence is admissible only if I conclude that it is:

a) Of specific instances of sexual activity;

b) Relevant to an issue at trial; and

c) Has significant probative value which substantially outweighs the danger of prejudice to the proper administration of justice.

Factual Foundation

[14] In order to address these three questions, I must briefly outline the allegations themselves and the proposed evidence.

[15] For the purposes of this hearing, the allegations are established via Exhibit 5 – the affidavit of Mr. Craggs which appends a portion of the transcript of the statement provided by A.M.Y. to Cst. Nancy Wagner on January 14, 2015. Briefly, A.M.Y. said that:

- On December 31, 2014, A.M.Y. and W.H.D. attended a New Year's Eve party in Halifax. Both consumed alcohol.
- A couple of times during the evening W.H.D. tried to kiss her but she was able to do the 'bob and weave.'
- She was sitting on the couch and he grabbed her by the arm and pulled her up to dance. He tried to twirl her but ended up throwing her into a wall where she hit her head 'pretty hard.' She believes that she was knocked out.
- She flirted a little with W.H.D. when discussing his beard and was 'just playing around with him.'

- Later, when the party was dying down, W.H.D. had her against the wall. She was unable to do the 'bob and weave' and she believes he had pinned her knees together. He is much bigger and stronger than she is.
- At one point, he had his hands in the back of her hair saying "You're not so tough now, are you?" An apparent reference to an earlier discussion about her fitness regime.
- A.M.Y. tried to back away but was grabbed by the back of the head again. He banged the back of her head off the wall and at one point she landed in a chair. W.H.D. then grabbed her to pick her up and his hands were touching her body while he tried to kiss her. He bit her lips, chin, neck and shoulders.
- She felt completely overpowered. She had bruises on her arms and cuts to the inside of her mouth as a result of W.H.D. squeezing her face so hard that her braces split the inside of her mouth.
- A.M.Y. did not consent to the advances. She asked W.H.D. to stop including saying "I am seeing someone" and "I can't do this."
- W.H.D. stopped when another woman at the party physically intervened after she saw A.M.Y. say 'Please help me."
- In describing her prior relationship with W.H.D., A.M.Y. said that they had a couple of dates about 3 ½ or 4 years ago. They never slept together. Had a kiss; that was it.

[16] The position of the defence is established via Exhibits 2 and 3 – an affidavit and supplementary affidavit of W.H.D. Briefly, W.H.D.'s position is that:

- He met A.M.Y. in February of 2012 through mutual friends.
- On two occasions, likely February 4th and 11th of 2012, he and A.M.Y. were intimate.
- On each occasion they were in A.M.Y.'s bedroom, clothing was removed and intimate sexual contact occurred. W.H.D. spent the night with A.M.Y.
- On February 4th, 2012, during the course of the intimate contact A.M.Y. invited W.H.D. to "slap my ass".
- On December 31, 2014 W.H.D. attended the New Year's Eve Party described by A.M.Y.
- Prior to midnight, and in the course of light hearted conversation A.M.Y. said to W.H.D. and two others that she liked "getting slapped on the ass."
- Sometime after midnight W.H.D. asked A.M.Y. if she remembered how she liked it when he "slapped her ass".
- A.M.Y. answered in the affirmative following which they became physically close and began to kiss each other in the living room in the presence of several other people.

- This continued for an extended period of time.

- W.H.D. held A.M.Y.'s hands over her head against the wall during their physical contact as he believed, based on their previous intimate contact, that she enjoyed being physically dominated.

- Most of the contact involved W.H.D.'s hands on A.M.Y.'s shoulders and arms and her hands were on his shoulders and near his neck.

- W.H.D. interpreted A.M.Y.'s conduct at the party as consensual and mutual.

[17] In summary, the evidence at issue can be described as having three components. Firstly, on two occasions in February of 2012, A.M.Y. and W.H.D. spent the night together participating in sexually intimate contact. Secondly, the intimate contact was much more than 'just a kiss' in that it involved the removal of clothing and very intimate mutual sexual relations. The intimacy did not include sexual intercourse. Thirdly, during the sexual intimacy of February 4th, 2012, A.M.Y. invited W.H.D. to "slap her ass". To be clear, W.H.D. has described the sexual intimacy in much more detail than I have used here. As I will explain, my analysis does not require such detail.

[18] The defence proposes that the evidence be adduced by way of cross-examination of A.M.Y., and, if W.H.D elects to give evidence, that he be permitted to testify in accord with his affidavit evidence. The position of the defence is that the evidence is highly relevant and necessary for W.H.D. to make full answer and defence.

[19] The Crown argues that the proposed evidence is neither relevant nor probative of an issue at trial and that to permit W.H.D to adduce this evidence would serve to fuel the harm caused by widespread stereotypes and myths surrounding sexual activity evidence.

[20] Further, the Crown takes the position that W.H.D. ought to be prohibited from asking A.M.Y. any questions whatsoever which involve the suggestion that A.M.Y. uttered a phrase like 'slap my ass' in any context. The Crown's position extends to the utterances W.H.D. says were made on December 31, 2014. The prohibition found in section 276 relates to sexual activity other than the sexual activity that forms the subject-matter of the charges. I conclude that the provision does not extend to the interaction between A.M.Y. and W.H.D. on the evening of the party during which the sexual assault is alleged to have occurred.

Is the proposed evidence of specific instances of sexual activity?

[21] As required by the ruling of the Supreme Court of Canada in *R. v Darrach*, W.H.D.'s affidavits supply detailed particulars of the proposed evidence. The proposed evidence has been described in specific terms. It captures two identifiable events in February of 2012. The nature of the evidence is specific as to date, place and the extent of the sexual activity. The two events described are said to be the only two occasions during which A.M.Y. and W.H.D. had such intimate contact.

[22] In *R. v R.V.*, 2018 ONCA 547, the Ontario Court of Appeal considered the extent to which specificity must be demonstrated to satisfy the requirements of s. 276(2)(a). Writing for the Court, Justice Paciocco framed the issue as follows:

> [45] Thus the phrase "specific instances of sexual activity" does not require, as a necessary condition, the particularization of identified instances of sexual activity. It requires instead that the proposed evidence be adequately identified to enable a proper s. 276 evaluation to be undertaken, and for the Crown to safeguard the complainant's legitimate interests.

[23] In this case, the proposed evidence has been identified with sufficient precision to allow the admissibility of the evidence to be properly determined, and for the Crown to protect the legitimate interests of A.M.Y. The specificity has allowed the Crown to make argument as to the relationship between the proposed evidence and trial issues concerning consent, honest but mistaken belief in consent and credibility. I am satisfied that the proposed evidence meets this element of the test.

Is the proposed evidence relevant to an issue(s) at trial?

[24] The defence contends that relevance is established in three ways:

(a) The proposed evidence is necessary to assess the particular context within which A.M.Y. and W.H.D. interacted on December 31, 2014. The defence position is that the contact which occurred was consensual and was initiated by W.H.D. as a result of the prior intimacy, particularly on February 4, 2012 during which A.M.Y. uttered the 'slap my ass' phrase.

(b) In the event that I find that the interaction on December 31, 2014 was not consensual, the issue of honest but mistaken belief in consent will be a live issue at trial. As above, there is a nexus between the prior sexual activity and the interaction of A.M.Y. and W.H.D. on December 31, 2014.

(c) The evidence goes directly to the assessment of A.M.Y.'s credibility as she has denied the prior, albeit brief, relationship and intimacy with W.H.D. in her statement to police.

(a) Is the proposed evidence relevant to and necessary for the assessment of the defence position that the contact between A.M.Y. and W.H.D. on December 31, 2014 was consensual?

[25] The written argument presented by the defence relies upon the nexus between the prior sexual activity evidence and honest but mistaken belief in consent. However, the affidavit evidence authored by W.H.D. expresses actual consent on the part of A.M.Y.. In Exhibit 3, paragraph 6, W.H.D. offers that "based on A.'s words and body language toward me" he believed that he had consent. I conclude that it is necessary to assess the proposed evidence in this light.

[26] In *Darrach* the Supreme Court observed that evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent. The decision references the Court's earlier reasoning in *Ewanchuk* which defined the element of consent in a s. 271 offence, as above, noting that the determination of consent is only concerned with the complainant's perspective. It is self-evident that this proposition is based upon acceptance of the complainant's evidence on this point.

[27] In this case, the evidence tendered on the application establishes that the complainant's statement satisfies the *actus reus* of the offence in that she told the investigating officer that she did not consent to the sexual contact. As to the *mens rea*, the theory of the Crown is that the complainant's evidence will establish this element of the offence in that A.M.Y. communicated

to W.H.D, both by words and actions, that she was not consenting to the sexual activity she reported to police. It is in this sense that the defence argues relevance is made out.

[28] According to the defence, the significance of the prior sexual activity lies not in the details of the prior sexual activity, rather it lies in the fact that during the course of prior intimate sexual activity the complainant is said to have uttered a very particular phrase. One which was, according to W.H.D., repeated on December 31, 2014 and which led to the beginning of what he says was consensual sexual activity.

[29] To the extent that the defence submission is framed, at least in part, on the basis that the evidence is necessary as "narrative" or as "context" of the prior relationship, the submission fails. More is required to establish admissibility under the three part test in s. 276(2).

[30] The evidence in dispute is not so significant that it could be determinative on the issue of consent. However, the theory of the defence is that the evidence is central to the defence position that the conversation between W.H.D. and A.M.Y. which led to "making out" started with a conversation premised upon the "slap my ass" comment alleged to have been uttered by A.M.Y. at the party. In this sense evidence of the comment made on December 31, 2014, which is said to have originated during the course of prior sexual intimacy in February of 2012, is the foundation of the defence. I am satisfied that relevance has been established.

(b) Is the proposed evidence relevant to the potential issue of honest but mistaken belief in consent?

[31] Mistaken belief in consent has been described by Dickson, J. (as he then was) in the 1980 decision of the Supreme Court of Canada in *Pappajohn v. the Queen*, [1980] 2 S.C.R. 120, as

being more accurately seen as negating the guilty intention required for a conviction – as opposed to the affirmation of a positive defence. Where an accused acts innocently, with a flawed perception of the facts and in fact commits the *actus reus* of the offence – mistake is a defence.

[32] Justice Dickson went on to say that reasonableness of the accused's purported belief is an important factor in assessing the accused's testimony, but is not a requirement for the defence to succeed. The *Criminal Code* was subsequently amended. In particular, s. 265(4) now captures this principle. In addition, s. 273.2 restricts the availability of apprehended consent as a defence to the charge where an accused's belief arises from self-induced intoxication, recklessness or wilful blindness. Equally, where the accused does not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting, the defence will fail.

[33] In short, the defence is only available if the accused believed that the complainant communicated consent, by words or actions, to the sexual activity at issue. There is no suggestion here that self-induced intoxication is at issue in this case.

[34] In *Darrach* the Court explained how evidence of prior sexual activity might be relevant to the issue of honest but mistaken belief in consent (at para. 59):

> To make out the defence, the accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question" *(Ewanchuk, supra,* at para. 46 (emphasis in original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what be believed at

> the time of the alleged assault. This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute.

[35] A trier of fact need not consider honest but mistaken belief of consent unless there is an air of reality to the defence. That is, an air of reality in relation to whether the accused held an honest but mistaken belief in consent, and as to whether the accused took reasonable steps in the relevant circumstances.

[36] The law is clear. The accused need not testify to raise honest but mistaken belief in consent. Any evidence before the court, including the complainant's testimony, may support the argument.

[37] With these principles in mind, and with the guidance found in the Nova Scotia Court of Appeal's 2013 decision in *R. v. I.E.B.,* 2013 NSCA 98, and considering the evidence available to me at this stage in the proceedings, the matter is resolved as follows:

- Consent, for the purpose of establishing the *actus reus*, is actual subjective consent in the mind of the complainant at the time of the sexual activity. If the *actus reus* is not proven, the offence is not made out. Here, the complainant's statement to the investigating officer is that she did not consent to the sexual activity with W.H.D on December 31, 2014.

- Assuming for the purposes of the *voir dire* that the *actus reus* will be proven, the court will proceed to consider the *mens rea* component. The *mens rea* of the offence is made out upon proof that the accused knew that the complainant was not consenting to the sexual act, or was reckless or wilfully blind to the absence of consent. *Mens rea* is

considered from the perspective of the accused. Here, W.H.D.'s affidavit evidence advances the position that he thought that the complainant was consenting to the sexual activity, and was neither reckless nor wilfully blind as to her lack of consent. The evidentiary foundation rests, in part, upon W.H.D.'s contention that, prior to any sexual contact, the complainant made a comment "about how she liked "getting slapped on the ass"" and a short time later when he asked her if she liked it when he "slapped her ass", she responded in the affirmative. The physical contact, according to the defence, started after this interaction.

- The accused may raise the defence of honest but mistaken belief in consent if he believed that the complainant communicated consent to engage in the sexual activity. A belief based solely on silence, passivity or ambiguous conduct will not provide a defence. Here, as above, the "slap my ass" evidence will be part of the evidentiary foundation on the issue of honest but mistaken belief in consent.

[38] I am satisfied that W.H.D. has established that the evidence of prior sexual activity, during which the "slap my ass" comment is said to have been made, is relevant to honest but mistaken belief of consent. I should add, the accused also contends that the prior sexual activity evidence is relevant to his belief that A.M.Y. liked to be physically dominated. I am not satisfied that the defence has established on a balance of probabilities a sufficient evidentiary foundation to support admission of the evidence on that basis. Exhibit 2 is the sole evidentiary foundation in support of this argument. In it, the accused contends only that "at one point she got up on all fours and told me "slap my ass". There is no other evidence which would support the contention

that 1) the accused "understood her boundaries and preferences" or 2) that during the prior sexual activity there were prior acts of domination or of physically over-powering A.M.Y.

(c) Is the proposed evidence relevant to the issue of credibility?

[39] It is readily apparent that the issue of credibility will be a central feature in this prosecution. The complainant and the accused proffer divergent versions of the events of December 31, 2014. On one version A.M.Y. was physically dominated, kissed and fondled without her consent resulting in some physical injury. On the other version of events, two adults engaged in consensual sexual activity at a New Year's Eve party after each had consumed alcohol. The credibility and reliability of the evidence of A.M.Y. will be of great significance in this trial.

[40] It is also readily apparent that the complainant and the accused proffer divergent versions of their prior relationship. In general terms, whether or not they had previously engaged in intimate sexual relations may be of significance at trial. Details of the specific intimate contact seem immaterial. However, the 'fact of' a prior, albeit brief, period of intimacy has relevance. If, as the defence contends, A.M.Y. was not completely honest with the investigating officer, it will be a matter to consider in assessing her credibility. On the other hand, if A.M.Y.'s evidence on this point is believed, the defence theory on this point will be significantly weakened.

[41] In *Darrach,* the Supreme Court of Canada explained that evidence of sexual activity may be proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement. Gonthier, J. wrote for the unanimous Court (paragraphs 36 to 37):

> This Court has already had occasion to admit evidence of prior sexual activity under the current version of s. 276. In *Crosby*, *supra*, such evidence was admissible because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility (at para. 14). This case itself demonstrates that s. 276 does not function in practice as a blanket exclusion, as alleged by the accused. On the contrary, s. 276 controls the admissibility of evidence of sexual activity by providing judges with criteria and procedures to help them exercise their discretion to admit it. …
>
> An accused has never had a right to adduce irrelevant evidence. Nor does he have the right to adduce misleading evidence to support illegitimate inferences: "the accused is not permitted to distort the truth-seeking function of the trial process" (*Mills*, *supra*, at para. 74).

Accordingly, while the provision is legitimately intended to prohibit evidence which is either irrelevant or mis-leading, it is not intended to infringe the accused's right to make full answer and defence.

[42] I am satisfied that the evidence of prior sexual activity, in its general sense only, is relevant to the way in which this trial will likely unfold, that is, credibility will be an essential element of my ultimate determination. However, the ability to make full answer and defence will be satisfied by allowing cross-examination of the complainant, and evidence from W.H.D. which references only in general terms, the prior sexual activity said to have taken place in February of 2012.

Does the evidence have significant probative value which substantially outweighs the danger of prejudice to the proper administration of justice?

[43] The specific language of this provision is of significance. The provision allows for the admission of evidence with *significant* probative value that is not *substantially* outweighed by the identified danger. In *Darrach,* the Supreme Court explained that "both sides of the equation

are heightened in this test, which serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity" evidence (at para. 40).

[44] I have considered the factors in s. 276(3), some of which have particular relevance to the analysis of this element of the test. Broadly speaking, the factors concern two interests. On the one hand, I must be satisfied that admission of the evidence will serve the interests of justice, including the right of the accused to make full answer and defence, and that it offers a reasonable prospect of assisting in a just determination of the case (sections 276(3)(a) and (c)). On the other hand, I must recognize the harm caused by the myths and stereotypes surrounding sexual activity evidence. The societal interests at play in this regard include 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 arouse sentiments of prejudice, sympathy or hostility; 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) and (g)). (*R. v. J.W.S., 2012 NSPC 101*, at paras. 18-19)

[45] Society's interest in encouraging the reporting of sexual assault offences is a significant concern. Balancing the accused's right to make full answer to the allegations is assessed in context. I must consider the nature of the proposed evidence in terms of its potential to cause upset and embarrassment to the complainant should I grant the application. I am also mindful of the fact that I can ensure that the evidence is admitted only to the extent necessary to advance the proposed defences.

[46] As discussed above, the proposed evidence is relevant in more than one way. It is relevant to the assessment of the issue of credibility in the context of a case where credibility will be significant. In addition, the evidence is relevant to the proof of the *mens rea* of the offence as it relates to accused's perception of the unfolding events and to the issue of honest and mistaken belief in consent. These considerations militate towards allowing the evidence as an expression of W.H.D.'s ability to make full answer and defence, and, as assisting me in making a just determination of the case.

[47] Clearly, the evidence is very private and may cause the complainant additional distress during the course of her evidence. However, as I alluded to earlier, the aspects of the evidence which are relevant to the trial do not require a detailed examination of the nature of the sexual activity which W.H.D. alleges occurred in February of 2012. It will be sufficient to allow the defence to elicit evidence in a general sense concerning prior sexual activity in February of 2012 and particularly on February 4, 2012 during which the complainant is said to have invited W.H.D. to "slap my ass". No questions will be permitted which would involve a detailed account of the prior sexual activity.

[48] In this way, W.H.D. will be permitted to explore the proposed evidence which, if accepted, would impact proof of the *mens rea* of the offence, but the potential detrimental impact upon the complainant is reduced. It seems apparent that the importance of the evidence to the defence is not found in the details of the sexual activity described by W.H.D. Rather the relevance is found in the general sense of intimate sexual contact during which a very specific phrase was used by A.M.Y. The defence conceded that there is nothing to be gained from

examining A.M.Y. as to the details of the sexual contact. It matters only that there was, on two prior occasions, sexual intimacy involving the removal of clothes and intimate sexual contact, and of critical importance, on the first occasion the "slap my ass" statement.

[49] It is significant that this is a judge alone trial. The probative value of the evidence does not depend upon discriminatory beliefs or biases. There is no danger that the evidence will be used for an improper purpose, or that I will engage in prohibited lines of reasoning and thereby misuse the evidence. The proposed evidence is discrete in terms of time, place and content, and the defence will be constrained in its treatment of the evidence in order to ensure that only what is relevant is adduced.

[50] Accordingly, the application is granted to this extent:

a) The defence is entitled to examine the complainant, and W.H.D. is entitled to testify as to the events of February 4 and 11, 2012 on the question of whether the accused and the complainant were together, in her apartment, and later in her bedroom, including the following: while in the bedroom there was kissing and sexual intimacy; clothing was removed and acts of sexual intimacy performed upon each other; W.H.D. spent the night.
b) Evidence is also permitted as to the question of whether, on February 4, 2012, during the course of the sexual activity described above, the complainant at one point got up on all fours and invited W.H.D. to slap her ass.
c) No evidence will be elicited which involves questioning the victim or accused regarding any further details of the specific sexual activity which occurred in February of 2012.

Simmons, JPC