PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Baker,* 2019 NSPC 25

Date: 20190429
Docket: 8239425
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

Robert Merton Baker

Judge:	The Honourable Judge Paul Scovil, JPC
Heard:	April 29, 2019, in Bridgewater, Nova Scotia
Written Decision	July 15, 2019
Charge:	Section 271of the **Criminal Code of Canada**
Counsel:	Emma Baasch, Crown Attorney Brent Silver, Defence Attorney David Hirtle, Counsel for the Complainant

By the Court:

[1] Robert Baker has been charged with sexual assault on H. K. on the 28th day of May, 2018.

[2] Mr. Baker has applied pursuant to 276(1) of the **Criminal Code of Canada** to introduce evidence of prior sexual activity between Mr. Baker and the complainant.

Facts:

[3] Mr. Baker filed a Notice of Application, an Affidavit of Mr. Baker in support of the application, and Mr. Baker testified on the application itself.

[4] In his Notice of Application under 276.1, Mr. Baker listed eight reasons for the request. They are as follows:

> (a) That the Applicant is charged with a sexual assault on H. K., contrary to section 271 of the **Criminal Code** on or about the 28th day of May, 2018.
>
> (b) The Applicant will argue that the Complainant consented to the sexual activity that forms the subject matter of the charge. Alternatively, the Applicant will argue that the Applicant, honestly, but mistakenly, believed that the Complainant consented to the conduct which forms the subject matter of the charge.
>
> (c) That the Applicant seek permission to question the Complainant about prior sexual activity she engaged in with the Applicant during their relationship.

> (d) That it is further relevant in assessing the Complainant's conduct on the morning in question, her overall credibility, to assessing the Complainant's characterization of her relationship with the Accused and the Applicant's real or mistaken belief in the Complainant's consent to the sexual activity which forms the subject matter of the charge.
>
> (e) That the evidence sought to be adduced with respect to sexual activity between the Complainant and the Accused is relevant towards a possible motive to fabricate on the part of the Accused.
>
> (f) That the evidence sought to be adduced is thus admissible in order to allow the Applicant to proffer a full answer and defence, pursuant to section 11 (d) of the **Charter of Rights and Freedoms**.
>
> (g) That the evidence sought to be adduced by the Applicant is specific in nature, and has significant probative value, which is not substantially outweighed by the danger of prejudice to the administration of justice.
>
> (h) Such other and further grounds as counsel may advise and this Honourable Court may permit.

[5] Mr. Baker seeks to introduce evidence that he was a friend of both the complainant and her boyfriend. At some point, the boyfriend was removed from the complainant's residence. After that, Mr. Baker's wishes to introduce evidence that the complainant became flirtatious, exposed herself by leaving her housecoat open and told Mr. Baker that "kisses are free".

[6] Mr. Baker indicated that he would come to the complainant's residence in the morning to wake her and make coffee. The complainant has children and Mr. Baker would assist getting the children to day care.

[7] Regarding the incident of sexual activity, other than the index offence, Mr. Baker states he went to wake the complainant up. As she was waking he began to touch her. She touched him back which led to full intercourse.

[8] The next contact sexually was the offence. On the morning in question, Mr. Baker went in to wake up the complainant. He decided to initiate sexual intercourse. He got undressed in the dark and got into bed with the complainant. He believed she was awake when he got into bed but if she was not, he says, he had to unwrap covers from around the complainant's leg.

[9] He began to touch the complainant and then got on top of her. According to Mr. Baker, the complainant said, "wait, there are children present". Mr. Baker then stopped his advances.

[10] In his testimony on this application, Mr. Baker, when asked in relation to the index offence, if he remembered talking at all to the complainant, he replied, "I don't really remember if I spoke to her or not".

[11] The Crown asked Mr. Baker if he agreed based on his affidavit that he did not talk to the complainant before getting into bed with her. To that he replied, "Well, it looks that way, I guess".

[12] In his testimony, Mr. Baker also agreed that because he had sex with the complainant on the other occasion he expected to have sex with her on the day in question.

[13] In his factum at paragraph six, Mr. Baker indicates, “The applicant seeks to provide context to those circumstances in his affidavit”.

[14] Further at paragraph 23, he states the prior sexual activity, “is relevant to the issues at trial” and has significant probative value as he stated:

> 23. It is respectfully submitted that the evidence which the Applicant seeks to adduce is of specific instances of sexual activity, is relevant to the issues at trial, and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> 24. Further, as elaborated upon herein, the said evidence, particularly with respect to the relationship between the Applicant and Complainant, is highly relevant to issues or credibility and is necessary to provide context in order to arrive at a just determination in this case. It is respectfully submitted that in the absence of the further evidence which the Applicant seeks to put before this Honorable Court, the Complainant anticipated evidence is potentially misleading because it mischaracterizes the parties relationship and otherwise places the true nature of their relationship under false light.
>
> 25. The evidence which the Applicant seeks to adduce is relevant in assessing the Complainant’s conduct during the morning in question, her overall credibility and the Applicant’s honesty but mistaken belief that the Complainant had consented to sexual relations. The evidence relate to specific instances of sexual activity other than that forming the subject matter of the within charge. The evidence is not tendered to support connotation that section 276 is specifically designed to prohibit, namely, that the complainant “is more likely to have consented to have sexual activity that forms the subject matter of the charge or is less worthy of belief”.

[15] He went on to say:

> 34. In the case at bar, it is respectfully submitted that the proposed evidence is not being adduced for the purpose of suggesting that the Complainant is more likely to have consented to the sexual nature forming the subject matter of the current charge, or is less worthy of belief, by virtue of having engaged in the sexual activity which the applicant seeks to introduce.
>
> 35. It is the Applicant's contention that, contrary to the characterization that is anticipated to be put forth by the complainant in her testimony, based upon her earlier statement to police, the relationship between the Applicant and the Complainant was distinctly more than merely platonic in nature. It is respectfully submitted that should the complainant's contextualization of the parties platonic relationship be left unchallenged, the Applicant would be left without crucial evidence necessary for him to make a full answer and defence. Thus, it is clear that evidence regarding the parties past sexual conduct is vital to contextualizing the party's relationship and to putting forward a full answer and defence.
>
> 36. Further, the evidence that is sought to be adduced is also relevant to the defence of either real or honest but mistaken belief in consent.

[16] After the release of *R. v. Barton*, 2019 SCC 33, Mr. Baker filed a Rebuttal Memorandum. There Mr. Baker argued that the prior sexual encounter is "strikingly similar" to the events that give rise to the offence. Mr. Baker again falls back on the need to explain the context in which the offence took place.

276(1)

[17] Section 276 (1) states as follows:

276(1) 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

(a) is more likely to have consented to the sexual activity that forms the subject matter of the charge; or

(2) In proceedings in respect of an offence referred to in subsection (1), evidence shall not 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 278.93 and 278.94, that the evidence

(a) is not being adduced for the purpose of supporting an inference described in subsection (1);

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

(c) is of specific instances of sexual activity; and

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

(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account:

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination 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.

R. v. Barton, R. v. Goldfinch

[18] Very recently, the Supreme Court of Canada weighed in on 276 (1) applications and gave a great clarity to trial judges who regularly deal with these applications. *In R. v. Barton*, 2019 SCC 33 and *R. v. Goldfinch*, 2019 SCC 38, the court fully considered the provisions under 276(1).

[19] In *Goldfinch* at paragraph 103, the Supreme Court sets out that a judge at trial must first consider 276(1) and then determine if the proposed evidence satisfies the three requirements set out in 276(2) taking into account those factors listed in 276(3).

[20] It is clear that evidence the complainant engaged in sexual activity with the accused may not be admitted to support the twin-myths of stereotypical sexual behaviour. Those myths are that the complainant, because of prior sexual activity

is more likely to have consented to the sexual activity in question and also that, because there was prior sexual activity, the complainant is less worthy of belief.

[21] In *Goldfinch*, the court was faced with a fact situation where the accused claimed a history of "friends with benefits" and that knowing this relationship was important to understanding the defence of honest but mistaken belief in consent.

[22] Under 276(2), the first requirement is that the evidence is of specific sexual activity. Here that requirement is met. There was one prior instance of intercourse, according to the accused, together with an open housecoat exposing the complainant and the statement, "kisses are free". These are all specific instances of sexual activity. I find, therefore, the first requirement under 276(2) has been met.

[23] The second requirement is that the activity is relevant to an issue at trial. To show this the accused must establish a connection between the complainant's sexual history and the accused's defence. (see *R. v. Darrack*, 2000 SCC 46)

[24] Mr. Baker, in his Rebuttal Memorandum, states that without being able to explain the context which led to him being naked and in the complainant's bed, he cannot effectively defend himself. Mr. Baker goes on to argue that is critical to his

defence to show he took reasonable steps to confirm the complainant's consent by pulling the sheets from her.

[25] In my mind, the argument of Mr. Baker does nothing to provide an explicit link between the prior sexual activity and any defence put forward. None of the prior sexual activity assists the court in determining if the complainant gave a communicated consent to the sexual activity that forms the charge before the court.

[26] As was stated in Goldfinch at para. 119:

> [119] Where sexual activity evidence is concerned, the failure to identify the explicit link between the evidence and specific facts or issues relating to the accused's defence can result in twin-myth reasoning slipping into the courtroom in the guise of "context". For example, there is a risk that sexual activity evidence may be used, whether consciously or not, to "contextualize" a complainant's testimony that she did not consent to the sexual activity in question through twin-myth reasoning: because the complainant consented in the past (the "context"), it is more likely that she consented this time as well. This is, of course, precisely the sort of stereotypical reasoning s. 276(1) sought to banish from the courtroom. Yet without a clear and precise identification of specific purpose for which sexual activity evidence is sought to be introduced, this sort of reasoning can all too easily infiltrate the courtroom through the Trojan horse of "context".

[27] The court went on to say at para. 124:

> [124] To be clear, however, just as generic references to "context" or "narrative" will not suffice to justify the admission of sexual activity evidence under s. 276(2), bare invocation of "credibility" will not be enough. Credibility is a key issue in almost every sexual assault trial –the centrality of credibility assessments does not, however, allow the accused to bypass the rigours of s. 276. Instead, where credibility is concerned, the accused must identify specific facts or issues that require reference to the

> sexual activity evidence to be understood and that could have a material impact on a credibility assessment.

[28] The third requirement of 276(2) is that the evidence has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[29] Here Mr. Baker argues that the introduction of the prior sexual conduct sheds light on the accused's honest but mistaken belief that the complainant communicated consent to sexual activity on the date in question. In support of this, Mr. Baker cites paragraph 93 of *R. v. Barton* where the Supreme Court stated:

> "Focusing on the accused honest but mistaken belief in the *communication* of consent has practical consequences. Most significantly, in seeking to rely on the complainant's prior sexual activities in support of a defence of honest but mistaken belief in communicated consent, the accused must be able to explain how and why that evidence informed his honest but mistaken belief that she *communicated* consent to the sexual activity in question at the time it occurred (see S. C. Hill, D. M. Tanovich and L. P. Strezos, *McWilliams' Canadian Criminal Evidence* (5th ed. Loose-leaf), at 16:20.50.30). For example, in some cases, prior sexual activities may establish legitimate expectations about how consent is communication between the parties, thereby shaping the accused's perception of communicated consent to the sexual activity in question at the time it occurred. American scholar Michelle Anderson puts it this way: "prior negotiations between the complainant and the defendant regarding the specific acts at issue or customs and practices about those acts should be admissible. These negotiations, customs, and practices between the parties reveal their legitimate expectations on the incident in question" (M. J. Anderson, "Time to Reform Rape Shield Laws: Kobe Bryant Case Highlights Holes in the Armour" (2004), 19:2 *Crim. Just.* 14, at p. 19, cited in Hill, Tanovich and Strezos, at 16:20.50.30). These "negotiations" would not, however, include an agreement involving broad advance consent to any and all manner of sexual activity. As I will explain, a belief that the complainant gave broad advance consent to sexual activity of an undefined scope will afford the accused no defence, as that belief is premised on a mistake of law, not fact."

[30] Here after citing the paragraph above, there was nothing from Mr. Baker explaining how and why the evidence of prior sexual activity informed his belief, mistaken or otherwise, that the complainant communicated that she was agreeable to sexual contact. More to the point, there was nothing in either Mr. Baker's Briefs or his testimony in court to show that the complainant communicated anything at all to Mr. Baker when he climbed into bed with her naked.

[31] To that end, there is nothing which shows the evidence that Mr. Baker seeks to introduce has any real probative value, let alone significant probative value. If allowed in, the prior sexual activity would be more likely used to support the twin-myths, which is forbidden.

[32] Given all the above, Mr. Baker's application is denied. In coming to this determination, I have fully considered those factors set out in 276(2).

Paul B. Scovil, JPC