

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D.E. W.*, 2009 NSSC 112

Date: 20090317

Docket: CRH 306406

Registry: Halifax

Between:

Her Majesty The Queen

v.

D. E. W.

Restriction on publication: Section 486.4 C.C.C. (Sexual Assault)

Editorial Notice

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

Judge: The Honourable Justice M. Heather Robertson

Heard: March 17, 2009, in Halifax, Nova Scotia

Decision: March 17, 2009 (*Voir Dire #1 - Orally*)

Written Release: May 29, 2009

Counsel: Shauna MacDonald, for the Crown
Anne L. Calder, for the defendant

Robertson, J. (Orally):

[1] The accused has made a Section 276.1 application seeking to tender evidence regarding prior sexual acts with the complainant relating to prior anal sex and prior consensual sex where the accused inserted his hand in her vagina.

[2] The accused is charged with sexual assault where it is alleged that he did on one occasion engage in non consensual anal sex, by entering the complainant's anus with his fist.

[3] The application is a two-step process, where I have already ruled that the defence has satisfied the Court that it met the conditions precedent and was entitled to a hearing under s. 276.2.

[4] I was satisfied that notice in writing had been provided within the requisite time, notwithstanding that a second replacement affidavit from the accused, was filed.

[5] I was also satisfied that the affidavit of the accused set out sufficient details of the evidence sought to be adduced, that were relevant to an issue at trial i.e. the defence of reasonable but mistaken belief that the complainant consented to the sexual behaviour in question. I was of the view that the evidence sought to be adduced was capable of admission under s. 276(2).

[6] I am aware that the Supreme Court of Canada in *R. v. Darrach* (2000), 148 C.C.C. (3d) 97 addressed the conditions precedent stage in great detail in paras. 52 - 59, setting out the requirement that the accused link the evidence of sexual activity to a specific defence.

[7] I am also aware of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 and the caution that "the determination of consent is 'only concerned with the complainant's perspective'" and that actual consent must be given for each instance of sexual activity.

[8] The *voir dire* was held and the accused gave evidence of the prior sexual conduct of the accused and the complainant during the course of their three-year common law relationship.

[9] His evidence was that consensually the accused and the complainant had engaged in progressively more experimental sex over the course of their relationship wherein he digitally penetrated her anus on many occasions, with one, two, three and later four fingers; that the complainant had in the past said she was not interested in anal penetration and he immediately stopped; that on other occasions when he had completed digital anal penetration the complainant would talk to the accused about the experience, asking how many fingers, how far in had he penetrated, how it felt to him to perform this act. He also testified that he and the complainant had sometimes been under the influence of crack cocaine, or he under the influence of alcohol or marijuana but not on the occasion of the sexual activity with which he is now charged.

[10] He seeks to introduce this evidence to substantiate his claim of an honest and mistaken belief as to consent.

[11] The accused's counsel cautions that these acts are not being sought to be introduced for any impermissible purpose i.e. to suggest the complainant is more likely to have consented to the sexual activity or is less worthy of belief.

[12] My task in excluding from mind any unpermissible use is made easier, as this is a judge alone trial and I do not have to instruct a jury as to forbidden thinking and analysis.

[13] I am satisfied that in accordance with the procedures set out in ss. 276.1 and 276.2 that the evidence sought to be adduced is:

(a) a specific instance of sexual activity i.e. as per paras. (d) and (e) of the accused's affidavit and his testimony before the court, respecting those specific instances.

- d. Approximately six or seven months into their sexual relationship, I D. W., and L. P. began to experiment with consensual 'anal' sex, involving the insertion of fingers (one to four) into the Complainant's rectum by me. During these times, the Complainant would inquire "how many fingers" I had inserted at various times and "how far" (into her rectum) did I insert them. During the time that I, the Applicant and the Complainant were together, there were a limited number of occasions when the Complainant would indicate that she did not wish to take part in "anal sex" at that time

(“I don’t feel like it tonight”, etc.) and at such times the Applicant *always and completely refrained* from any such activity.

- e. I, D. W., and the Complainant L. P., were in the regular habit of engaging in consensual sex, where I inserted my hand into the Complainant’s vagina as part of our regular sexual activity.

(b) is relevant to an issue at trial.

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

[14] In arriving at this determination, I have considered the factors set out in s. 276(3)(a-h), which I need not reiterate to counsel, as we have had a full discussion on these determining principles.

[15] Again, I am well aware of the exclusionary rule, which would present a greater challenge, if this were a jury trial but not so in a trial before me alone.

[16] I will say however, that in considering the factors set out in s. 276.3, I am mindful of the accused’s right to make full answer and defence and to advance the defence of honest and mistaken belief as to consent, in light of his evidence that the specific sexual activity was a progression or routine of events leading him to a reasonable belief of consent.

[17] This is not evidence after all of the complainant’s prior sexual activity with other individuals, but evidence of the nature of the activity engaged in by this couple in the course of their relationship.

[18] This evidence will in my view, assist me in arriving at a just determination in this case, absent prejudice to the complainant or significant loss of her privacy or dignity.

[19] We seek the truth of these events. This evidence is in my view relevant and admissible.

Justice M. Heather Robertson