SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Williams*, 2019 NSSC 399

Date: 20191011
Docket: CRAT 480175
Registry: Antigonish

Between:

Her Majesty the Queen

v.

Jonah Williams and Tyler Ball

Restriction on Publication: ss. 278.24(c), 486.4, 486.5 and 539(1)
In-Camera Appearance

VOIR DIRE DECISION ON S. 276 APPLICATIONS

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	October 2, 3, 4, and 9, 2019, in Halifax, Nova Scotia
Oral Decision:	October 11, 2019
Counsel:	Courtney J. MacNeil and Alicia K. Kennedy, for the Crown Craig M. Garson, Q.C., for the Defendant (J. Williams) Stanley W. MacDonald, Q.C. and Jack MacDonald (articled clerk), for the Defendant (T. Ball) Nasha Nijhawan, for the Complainant Ami K.A. Assignon, for the Attorney General of Canada (Records application only)

What follows is a decision rendered in relation to voir dires held October 2 – 6 and 9, 2019. Obviously, it predated the trial decision itself, which was reported R. v. Williams, 2019 NSSC 352. At the time of the voir dires, the accused election was for trial by Judge and Jury. After this decision, both accused re-elected (with Crown consent) to Judge alone.

The following decision was rendered October 11, 2019. After consideration of the factors noted in ss. 278.95(c) and 278.95(d)(ii), and after receipt of submissions from counsel for the complainant, I have redacted certain portions of it before publication.

By the Court (Orally):

[1] Each accused is charged with a single count of sexual assault under s. 271 of the *Criminal Code*. The complainant is S.H., an 18 year old female student at the relevant time. The incident is alleged to have occurred during the night of November 17 - November 18, 2017.

[2] All were university students at the relevant time, in Nova Scotia. S.H. was a freshman. Mr. Williams was in his second year of attendance, and Mr. Ball was also a freshman.

[3] The complainant asserts that she had consensual sex with the accused, Williams, earlier in the evening. On the heels of this, a "three-way" occurred with both accused, to which she says that she did not consent.

[4] Mr. Williams applies (1) for disclosure of records in the possession of two separate police forces in another province with respect to a complaint that S.H. had made to police when she was 15 years of age, with respect to acts of a sexual nature in relation to her by two males at that time ("the records application") and (2) "pursuant to s. 278.93 and 278.94 of the *Criminal Code* for the determination of the admissibility of evidence of "other sexual activity" between he and the complainant, other than that which forms the subject matter of the charge" under s. 276(2) of the *Criminal Code* ("the other sexual activity").

[5] Finally, all parties initially sought a determination of whether the changes inaugurated by Bill C-75, which came into effect on September 19, 2019, and, among other things, changed the manner in which juries are selected, apply retrospectively (hence, to this jury trial, which is scheduled to begin on October 21, 2019) or prospectively (in which case, the process that was in place when charges

were laid against the accused, and when the accused elected trial by Judge and jury, would apply, rather than the new provisions introduced by the Bill).

[6] These reasons will only deal with the first two applications. The third will be dealt with later, if necessary.

[7] These two applications were heard by way of *voir dire* which took place from October 2 – 4, 2019.

Details of Application

[8] As will be seen, both of the first two applications are related in the sense that they must ultimately be reconciled with the requirements of s. 276(2), if the evidence in question is to be admitted. However, before we arrive at that stage, it is important to understand the nature of the evidence itself in order to consider the arguments being made for and against admissibility.

[9] In relation to the first application, we do not know what the records themselves say. However, we do know what evidence Mr. Williams wishes to introduce in relation to the second.

[10] Those particulars sought to be introduced in relation to the second application are summarized in Mr. Williams' Notice of Application ("the Notice") as follows:

> Evidence of the prior sexual activity between the Applicant and S.H. between the late evening of 1 September, 2017/early morning of 2 September, 2017 and the late evening of 17 November, 2017/early morning of 18 November, 2017 and evidence of the four (4) prior consensual sexual encounters between the Applicant and S.H. between the early morning hours of 2 September, 2017 and the late evening of 17 November, 2017/early morning of 18 November, 2017 as set out in the Applicant's Affidavit filed with this Notice.

[11] As to why these particulars ought to be admitted, Mr. Williams asserts (p. 2) that:

> … these four (4) prior sexual encounters between the Applicant and S.H. are relevant to (i) whether S.H. consented to the sexual activity that forms the subject matter of the charge; (ii) the potential defence of honest but mistaken belief in communicated consent; (iii) the provision of context necessary for the jury understanding the events that took place during the late evening of 17 November, 2017/early morning of 18 November, 2017; (iv) to dispel the notion that the Applicant and S.H. were strangers; (v) to explain the circumstances that lead to the discussions between the Applicant and S.H. about having a threesome on the

> night in question; (vi) to allow the Applicant to defend himself against the inference the Crown will ask the jury to draw regarding the bruising on S.H.'s hip area; and (vii) the veracity of S.H.'s allegation and her credibility. Further particulars with respect to the relevance of this evidence are found in the Affidavit of the Applicant and contained in the Brief filed with this Notice.

[12] This accused, through his counsel, has properly withdrawn the contention expressed in (i) above in relation to the second issue. Elaboration on the incidents referenced in the Notice has been provided in Mr. Williams' affidavit of September 9, 2019. For present purposes, the tenor of most of this evidence may be gleaned from a "2000 foot level" overview. I will then return to deal first with the records, and then the second application involving the other sexual activity.

Overview of Evidence

[13] Williams says that the encounter between himself and S.H. on the night of November 17 – 18, 2017, was not their first sexual contact. There had been at least three occasions of such contact before that evening.

[14] Moreover, Mr. Williams argues that the sexual contact on the evening of November 17 – 18, 2017, to which he refers as the "4th sexual encounter", is actually one seamless incident, even though it began as a one on one sexual encounter involving himself and the complainant, and ended up involving three-way sex involving the two and another male (Mr. Ball).

[15] The Crown, and SH, on the other hand, argue that what went on that night actually comprises two separate encounters. It is argued that the first involved just SH and Mr. Williams, and was consensual, while the second was a "three-way" and was not consensual. It follows (as the argument unfolds) that only details of the second encounter that evening ought to be permitted, with one or two exceptions, with which I will deal in due course.

Mr. Williams' Evidence of the First Three Encounters

[16] Mr. Williams deposes that the three earlier sexual encounters took place … **[details redacted prior to publication]**

[17] Mr. Williams provides detailed information of what occurred leading up to and during these earlier encounters … **[details redacted prior to publication]**

[18] After their first encounter, Mr. Williams alleges that S.H. wanted more of a "boyfriend – girlfriend" type of relationship and attempted to initiate more sexual

contact. He described himself as telling her, in effect, that he hoped for further sexual contact in the future, but that he was not interested in an exclusive "boyfriend – girlfriend" relationship.

[19] **[details redacted prior to publication]**

[20] **[details redacted prior to publication]**

[21] **[details redacted prior to publication]**

[22] **[details redacted prior to publication]**

[23] **[details redacted prior to publication]**

What Mr. Williams says Happened on the Night of Friday, November 17 – Saturday, November 18, 2017

[24] This was the night that a university "wine mixer" event took place. Mr. Williams says that earlier in the day he was asked by S.H., in the hall of his dorm, if he was going to be around later, and when he responded in the affirmative, she said that she would find him and that she expected to spend some time alone with him (*affidavit, para. 32*).

[25] The accused again encountered her later that night in the dorm of two occupants of the fourth floor of his building. Those people had turned their dorm into a "party room". The beds were against the wall, and loud speakers with rotating, multi-coloured lights had been added (*affidavit, para. 33*).

[26] Mr. Williams was dancing with another female on an elevated ledge at the back of the room when S.H. entered.

[27] He suggests that she eventually ended up just below the ledge upon which he was dancing, and when the other female got down, S.H. got up and began dancing with him, which led to kissing and holding each other closely. Although he cannot remember who suggested it, they next left and went to his room, going directly to his roommate, J.M.'s bed.

[28] What followed was a period of one on one sex including oral sex during which S.H.'s "…actions and responses were the same … as they had been on the previous … occasions" (*affidavit, para. 36*). The sexual intercourse which followed lasted 45 minutes to one hour, and was in various positions as per the first two encounters, albeit he describes S.H. as being "more physical and aggressive"

during this encounter than previously. He also, again, spanked her while they were in the doggie-style position, and when she was on top of him. Mr. Williams goes on to add that this "…was by far the roughest of any consensual sexual encounters…" (*affidavit, para.36*).

[29] Given the duration and intensity of the sex, he describes a few breaks in that activity, during which they again discussed prior sexual experiences. He says "during these conversations I asked S.H. whether she wanted to have a threesome that night", and she replied in the affirmative.

[30] Sexual intercourse resumed, but it was interrupted by a knock on the door by Mr. Williams' roommate (J.M.) who wanted to gain access to his alcohol in the room. He alleges S.H. told him to ignore J.M. and he did.

[31] After they resumed intercourse, the complainant is alleged to have told Mr. Williams he was hurting her, so he stopped. Before resuming intercourse, they agreed he would use "lube".

[32] Once intercourse had resumed, J.M. again came to the door and asked to be let in. This time, Mr. Williams complied, with S.H. remaining in the bed under cover of J.M.'s bed sheet.

[33] J.M. came in accompanied by three other males, including Mr. Ball. Mr. Williams alleges that he made a joke, "so, are we going to have a six-some" to which everyone laughed, including S.H. Further joking references were made to a "fivesome" or a "foursome".

[34] Mr. Williams then asked S.H. if she was still interested in that threesome they had discussed, and she replied "yes". They are alleged to then have discussed the fact that two of the males in the room at that time already had girlfriends, and another said he was not interested. This left the accused, Mr. Ball. S.H. was asked whether she was okay with Mr. Ball, his co-accused, and she said "yes". He then left the room for one to two minutes, while S.H. and Mr. Ball remained in the room (*affidavit, paras. 37 -41*).

[35] Upon his return to the room, Mr. Williams says that he asked the complainant once again if she was sure she wanted a threesome, and she responded this time with either "yes" or "I am sure".

[36] Mr. Williams then says that with S.H. lying on her back, he began to perform oral sex upon her, and that physical responses were the same as they had

been during the one on one activity. He believes that S.H. was simultaneously performing oral sex on Mr. Ball (*affidavit, paras. 42 – 45*).

[37] Then came another knock on the door. Mr. Williams opened it. It was M.M.K., the complainant's roommate. She came in and encouraged S.H. to leave. Mr. Williams alleges that S.H. said she was "fine" and wanted to stay. M.M.K. left.

[38] After she left, the three discussed that it was weird for M.M.K. to have come into the room and say what she did. S.H. is alleged to have said that M.M.K. was "overreacting". Mr. Williams' evidence is that he once again asked S.H. if she wanted to continue, and she said that she did, so they continued, just as they had been before M.M.K. came in (*affidavit, paras. 42 – 45*).

[39] Next came another knock on the door, within minutes of the resumption of the two-way oral sex. This time, it was some residence assistants ("RAs") that requested entry. Mr. Williams was asked to leave the room by one of them (a female) because they had been asked to come in and check to see if everything was all right. Mr. Williams says he invited them in and left so that the female could talk to S.H.

[40] When Mr. Williams returned to the room, he was advised by the female RA (the exact words he does not recall) to the effect that everything was fine, so he went back in and the RAs left.

[41] Once again, Messrs. Williams, Ball and S.H. discussed how "weird" all of this was (*affidavit, paras. 46 -47*).

[42] But that was not the last interruption. Mr. Williams describes within a short period of time, M.M.K. came back and this time was banging loudly at the door. S.H. is expected to testify that she was kicking at it too. Mr. Williams again let her in. M.M.K. went to S.H., who was still lying on the bed, and is alleged to have repeated to S.H. "do you remember what happened?"

[43] In Mr. Williams' testimony, S.H. became very upset during this repetition by M.M.K., but he himself had no idea what she was talking about. He says that S.H. then abruptly got out of the bed, put her dress on and started to cry, saying to M.M.K. "but Jonah doesn't know". The two young women then left the room. By this time, the complainant was crying uncontrollably (*affidavit, para.48*).

[44] Evidence is expected from the RAs, Mr. Williams' roommate, and some other female acquaintances of S.H.'s, including M.M.K. and some of the others

who interacted with her when they entered the room, helped her out of it, and spoke with police afterward.

[45] The RAs were interviewed by the police. They are expected to testify at trial as to what they observed.

[46] The female RA is expected to testify that she went into the room, and Mr. Williams stepped out of it when she asked him to. She heard the other RA tell Mr. Williams that "there's some people here who want to speak to their friend".

[47] The female RA is further expected to testify that she went in and asked S.H. to the effect of "hey, how is your night going, do you want to be here?" She received the response from the complainant to the effect of "I'm fine, I want to be here". The RA is further expected to testify, on the basis of her police statement, that she said to S.H. that her friends wanted to see her, and that they are worried, to which the complainant responded "they're overreacting", and "my friends are just being them [selves]".

[48] At the Preliminary Inquiry (*beginning at p. 39, l.17*), the complainant testified that she had no memory of the female RA's visits, or of the conversation to which RA is expected to attest.

[49] This is not nearly an extensive synopsis of all of the expected evidence. It will suffice, however, to contextualize my decisions in relation to the two issues that these reasons will address:

1. the records application; and
2. the evidence of other sexual activity.

1. The Records Application

[50] As to the records, I begin with a consideration of s. 278.3. It reads as follows:

> 278.3 (1) An accused who seeks production of a record referred to in subsection 278.2(1) must make an application to the judge before whom the accused is to be, or is being, tried.
>
> (2) For greater certainty, an application under subsection (1) may not be made to a judge or justice presiding at any other proceedings, including a preliminary inquiry.
>
> (3) An application must be made in writing and set out

(a) particulars identifying the record that the accused seeks to have produced and the name of the person who has possession or control of the record; and

(b) the grounds on which the accused relies to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify.

(4) Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(a) that the record exists;

(b) that the record relates to medical or psychiatric treatment, therapy or counselling that the complainant or witness has received or is receiving;

(c) that the record relates to the incident that is the subject-matter of the proceedings;

(d) that the record may disclose a prior inconsistent statement of the complainant or witness;

(e) that the record may relate to the credibility of the complainant or witness;

(f) that the record may relate to the reliability of the testimony of the complainant or witness merely because the complainant or witness has received or is receiving psychiatric treatment, therapy or counselling;

(g) that the record may reveal allegations of sexual abuse of the complainant by a person other than the accused;

(h) that the record relates to the sexual activity of the complainant with any person, including the accused;

(i) that the record relates to the presence or absence of a recent complaint;

(j) that the record relates to the complainant's sexual reputation; or

(k) that the record was made close in time to a complaint or to the activity that forms the subject-matter of the charge against the accused.

(5) The accused shall serve the application on the prosecutor, on the person who has possession or control of the record, on the complainant or witness, as the case may be, and on any other person to whom, to the knowledge of the accused, the record relates, at least 60 days before the hearing referred to in subsection 278.4(1) or any shorter interval that the judge may allow in the interests of justice. The accused shall also serve a subpoena issued under Part XXII in Form 16.1 on the person who has possession or control of the record at the same time as the application is served.

(6) The judge may at any time order that the application be served on any person to whom the judge considers the record may relate.

[51] In this case, there is a preliminary issue, one of which counsel were not aware until advised relatively recently by the custodian of the records in issue. It is rendered concisely in counsel for the Attorney General's brief:

> 29. More specifically, the requested…records, as they relate to an offence alleged to have been committed by [a youth], and since the investigation lead to extrajudicial measures other than extrajudicial sanctions, fall within the category of records held by the RCMP under sections 115(1) and 115(1.1) of the *YCJA*. As such, they are subject to the protection of sections 118 and 129 of the *YCJA*.
>
> 30. To comply with the strict access regime set out in the *YCJA*, the applicants must first bring an application a Youth Justice Court Judge to request access to the youth records under Part 6 of the *YCJA*. It is only if they are successful after this first application, that this court can proceed with an analysis for the production of the youth records for use at trial pursuant to section 278.3 of the *Criminal Code*.

[52] So, what does the *Youth Criminal Justice Act* ("*YCJA*") tell us about records pertaining to a young person? In point form, they tell us that (the sections referenced are from the *YCJA*):

- Youth Court may keep a record of any case the comes before it. (s. 114)
- The police force responsible for or participating in the investigation of the offence shall keep a record of any extra judicial measures that they use to deal with young persons. (s. 115(1.1))
- No access except as authorized by *YCJA* under ss. 114 – 116 (as the records in this case are) and no information contained in the record to be given that where to do so would identify the "young person to whom it relates" as having been dealt wit under the *YCJA*.
- s. 119 – Records under s. 115 – access may be given to classes of people set out in
- s. 119(1)a-s, for the period prescribed in s. 119(2).

[53] It is not necessary to get into an analysis of the difference between "extrajudicial sanctions" and "extrajudicial measures", except to say that counsel advise that the young person here was dealt with by way of "extrajudicial measures", (to adopt *YCJA* parlance). We must, therefore, go to s. 119(4).

[54] S. 119(1) is expressly subject to s. 119(4) when what we are dealing with is "extrajudicial measures, other than sanctions", meted out to a young person. Access shall only be given (during the specified access period) to a peace officer, or the Attorney General for limited purposes, and/or another person participating in

a conference to decide on the appropriate extraordinary measure to which that young person shall be subject.

[55] While s. 123(1) allows an application to be made to a Youth Court Judge after the expiration of the applicable period set out in 119(2), s. 19(4) would appear to be an absolute prohibition with respect to the release of these particular records involving, as they do, "extrajudicial measures". None of the persons who seek access to them fall within the categories specified within that section.

[56] Quite apart from that, any applications which could otherwise have been brought for access to these records would be subject to the exclusive jurisdiction of the Youth Court Judge – so much so that not even a right of appeal exists from determinations made pursuant to these provisions. Clearly, such an application is a necessary prerequisite to the consideration of these records, for any purpose, whether pursuant to s. 278.3 of the *Criminal Code*, or otherwise.

[57] I conclude that compliance with the *YCJA* regime, which was not carried out in this case due to the relative lateness at which the nature of these records was brought to counsel's attention, is mandatory before any recourse in relation to them may be had under s. 278.3 of the *Criminal Code*.

[58] That said, even if it were open for me to consider the availability of these records under s. 278.3 and (ultimately) under the s. 276(2) regime, their contents could not possibly pass a stage one records analysis in any event. I will explain.

[59] Recall that a s. 278.3 hearing would be heard in camera pursuant to s. 278.4, at which a complainant "or any other person to whom the record relates" may appear and make submissions. Section 278.5 continues:

> 278.5 (1) The judge may order the person who has possession or control of the record to produce the record or part of the record to the court for review by the judge if, after the hearing referred to in subsection 278.4(1), the judge is satisfied that
>
> > (a) the application was made in accordance with subsections 278.3(2) to (6); and
> >
> > (b) the accused has established that the record is likely relevant to an issue at trial or to the competence of a witness to testify; and
> >
> > (c) the production of the record is necessary in the interests of justice.
>
> (2) In determining whether to order the production of the record or part of the record for review pursuant to subsection (1), the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of

> the complainant or witness, as the case may be, and of any other person to whom the record relates. In particular, the judge shall take the following factors into account:
>
> > (a) the extent to which the record is necessary for the accused to make a full answer and defence;
> >
> > (b) the probative value of the record;
> >
> > (c) the nature and extent of the reasonable expectation of privacy with respect to the record;
> >
> > (d) whether production of the record is based on a discriminatory belief or bias;
> >
> > (e) the potential prejudice to the personal dignity and right to privacy of any person to whom the record relates;
> >
> > (f) society's interest in encouraging the reporting of sexual offences;
> >
> > (g) society's interest in encouraging the obtaining of treatment by complainants of sexual offences; and
> >
> > (h) the effect of the determination on the integrity of the trial process.

[60] The foregoing is stage one of the process.

[61] Stage two of the process is set out in ss. 278.6 and 278.7, the relevant portions of which provide:

> 278.6 (1) Where the judge has ordered the production of the record or part of the record for review, the judge shall review it in the absence of the parties in order to determine whether the record or part of the record should be produced to the accused.
>
> (2) The judge may hold a hearing in camera if the judge considers that it will assist in making the determination.
>
> (3) Subsections 278.4(2) to (3) apply in the case of a hearing under subsection (2).
>
> 278.7 (1) Where the judge is satisfied that the record or part of the record is likely relevant to an issue at trial or to the competence of a witness to testify and its production is necessary in the interests of justice, the judge may order that the record or part of the record that is likely relevant be produced to the accused, subject to any conditions that may be imposed pursuant to subsection (3).
>
> Factors to be considered
>
> (2) In determining whether to order the production of the record or part of the record to the accused, the judge shall consider the salutary and deleterious effects of the determination on the accused's right to make a full answer and defence and on the right to privacy, personal security and equality of the complainant or witness, as the case may be, and of any other person to whom the record relates

> and, in particular, shall take the factors specified in paragraphs 278.5(2)(a) to (h) into account.
>
> [Emphasis Added]

[62] For now, it suffices to say that the records in question, whatever may be in them, and regardless of what they say the complainant had alleged happened between her and the other males at the time, in another province, cannot have any potential relevance to whether she consented to (i) the specific sexual activity (ii) on November 17 – 18, 2017, (iii) with both Mr. Williams and Mr. Ball. Nor can the contents of these records bear on her credibility as to what she says occurred on the night in question.

[63] Nor can the issue of what the extra provincial police department involved did, or did not do, as a result of this complaint, possibly reflect upon what happened in the case at bar, which occurred 2 – 3 years later.

[64] Succinctly put, the records themselves have no "potential relevance" to any of the issues that will arise in this case, whether S.H. consented to the specific activity in question, or, if she did, at what point (if at all) she withdrew it, or (alternatively) whether Mr. Williams and/or Mr. Ball had formed an honest but mistaken belief that she had communicated her consent to the impugned activities that night. Therefore, these records do not pass the stage one threshold when the factors under ss. 278.5 – 278.7 are considered.

[65] However, the fact of the complaint itself is different. It does pass the stage one test. It is potentially linked and relevant to an issue at trial because the apparent theory of both accused is that S.H. consented to the "threesome activity" until M.M.K. entered the room for the second time and made repeated references to "do you remember what happened", and S.H.'s response that "Jonah doesn't know." There are also the earlier remarks attributed to S.H. by both accused and expected to be attributed to her by at least one RA to the effect that her friends were "overreacting", and her subsequently beginning to cry when M.M.K. persistently repeated "do you remember what happened". Therefore, this evidence is potentially relevant to an issue at trial.

[66] Therefore, when I go on to consider the evidence, holistically, at stage two, and the references to what the RAs are expected to testify, as well that to which one or more of S.H.'s female acquaintances are expected to testify (based upon what is in their police statements) the evidence (merely that this earlier complaint was made) is absolutely critical to the accused's theory of the case, as has just been noted. Its probative value means that it is not being proffered in support of any

stereotypical myths or preconceived biases that it and the related sections of the Code were enacted to eliminate. Moreover, its criticality to the expected theory of the defence makes it significant, and this significance easily outweighs any potential prejudice that may arise by its inclusion.

[67] In the absence of knowledge of the fact of this earlier complaint, the jury will have absolutely no idea what to do with, or a context as to how to understand, this evidence to be offered by the Accused, which is also expected to be offered by several other witnesses ("Jonah doesn't know") should they choose to accept it.

[68] Moreover, the impact upon the complainant is significantly attenuated when it is considered that only the fact that S.H., when she was younger, had made a complaint to police of an incident of a sexual nature involving two other male persons, is to be admitted. Details are unnecessary. Also unnecessary is what the police did or did not do in relation to the complaint.

[69] The jury will be instructed on the use which may be made of this evidence, which is only to the effect of explaining the otherwise cryptic utterances of M.M.K., and of S.H., and the allusions to some evidence some other witnesses are expected to make in relation to these utterances. It is relevant to the Accused's theory of the case, and the defences upon which they rely.

[70] When I balance this very weighty consideration with the other factors in ss. 276(2), 278. – 278.7, I admit merely the information that the complaint itself was made. As noted, this involves only a reference to the fact that S.H. had made a complaint to the police when she was younger of an incident of a sexual nature in which two other male persons were involved.

[71] The jury will be specifically cautioned that the fact that such a complaint was made may bear no relevance and provide no support to either of the twin myths that are set out in s. 276(1), or with respect to any other flawed premises.

2. Other Sexual Activity

[72] The s. 276(2) procedure in relation to the evidence of other sexual activity also contemplates a two step procedure.

[73] To recapitulate, this second *voir dire* related to an application brought by Mr. Williams, one of the two accused, pursuant to s. 276(2) to allow evidence of sexual activity between himself and the complainant "other than the sexual activity that forms the subject matter of the charge".

Brief Recap

[74] Mr. Williams' affidavit dated September 9, 2019, asserts that he and Ms. H. are, or were, at the relevant times, students at a University in Nova Scotia. In late summer, early fall of 2017, they both arrived early, before classes began, because of their participation in varsity sports. In the complainant's case, this was **[details redacted prior to publication]**, in Mr. Williams' case, it was football.

[75] For all intents and purposes, they resided in the same dormitory, albeit in separate sections, she in "**[details redacted prior to publication]** House", he in "**[details redacted prior to publication]** House".

[76] Earlier, the details of how they met, and what Mr. Williams refers to as their four sexual encounters were recounted. To repeat, the Crown and complainant's positions would be that there were five sexual encounters, as they argue that the fourth and fifth, which occurred during Friday, November 17, 2017, to Saturday, November 18, 2017, were distinct sexual encounters.

[77] They concede that the first encounter that night was consensual and involved only the complainant and Mr. Williams. This was followed by a second (a threesome) involving both Mr. Williams, his co-accused, Mr. Ball and the complainant, to which S.H. did not consent. It is this latter incident which forms the basis of the charges that the two accused face.

[78] If they are to be viewed as two separate encounters on the evening of November 17 – 18, 2017, then a s. 276(2) application would be necessary before reference could be made to the consensual one on one sex between Mr. Williams and S.H. which preceded the threesome (as well as with respect to the other earlier episodes of sexual activity to which the accused also seeks to refer).

[79] S. 276 states:

> 276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, 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
> >
> > (b) is less worthy of belief.

Conditions for admissibility

(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.

Factors that judge must consider

(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.

Interpretation

(4) For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.

[Emphasis added]

[80] The procedure for hearings of this nature is set out in s. 278.93 ss. (1) – (4):

> 278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).
>
> Form and content of application
>
> (2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.
>
> Jury and public excluded
>
> (3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.
>
> Judge may decide to hold hearing
>
> (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

[81] At stage one we consider the three preconditions which must be satisfied before a s. 276 application involving "other sexual activity" may be brought.

[82] First, an application must be made in writing, providing detailed particulars of the evidence that the accused seeks to adduce, and the relevance of that evidence to an issue at trial (s. 278.93(2)).

[83] Second, a copy of the application must be given to the prosecutor and the clerk of the court at least seven days previously (s. 278.93(4)).

[84] Third, I must be satisfied that the evidence sought to be adduced is capable of admission under s. 276(2).

[85] If these prerequisites are met, then I must grant the application and hold a hearing under ss. 276(2) or 278.9 (stage two).

Stage One

[86] First, there can be no question of Mr. Williams' compliance with the first two criteria. The particulars provided by Mr. Williams, and which are alleged to

be relevant to an issue at trial, have been earlier discussed. The application was also provided to the prosecutor and clerk within the requisite timeframe.

Are They Capable of Being Admissible Under Section 276(2)?

[87] One must bear in mind, when considering this issue, the overarching strictures, otherwise known as the "twin myths", embodied in s. 276(1). 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 is either more likely to have consented to the sexual activity mentioned in the charge, or is less worthy of belief.

[88] It must be borne in mind that s. 276(4) tell us that "sexual activity" also includes communication made for a sexual purpose or whose content is of a sexual nature.

[89] We must also consider what may legally constitute "consent", and, by extension, what can potentially be involved in a defence of honest but mistaken belief that consent has been communicated by the complainant.

[90] Section 273.1 states:

> 273.1 (1) Subject to subsection (2) and subsection 265(3), "consent" means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.
>
> Consent
>
> (1.1) Consent must be present at the time the sexual activity in question takes place.
>
> Question of law
>
> (1.2) The question of whether no consent is obtained under subsection 265(3) or subsection (2) or (3) is a question of law.
>
> No consent obtained
>
> (2) For the purpose of subsection (1), no consent is obtained if
>
> > (a) the agreement is expressed by the words or conduct of a person other than the complainant;
> >
> > (a.1) the complainant is unconscious;
> >
> > (b) the complainant is incapable of consenting to the activity for any reason other than the one referred to in paragraph (a.1);
> >
> > (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

> (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.
>
> Subsection (2) not limiting
>
> (3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[91] The Court was required to provide reasons at the conclusion of stage one for its decision whether or not to hold a hearing under s. 276(2). These reasons were provided orally on October 3, 2019. I will summarize herein the oral reasons that were delivered at that time.

Summary of Reasons Rendered at Conclusion of Stage One

[92] Notwithstanding that it predates the myriad recent changes to the relevant sections of the *Code* with which we are dealing, *R. v. Ecker*, [1995] SJ No. 53 (SASK CA), still provides a sensible approach to the issue at this stage of the analysis:

> 61. … the first stage 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. And so I am of the view that 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.
>
> [Emphasis added]

[93] Support for this is found in the Alberta Court of Appeal in *R. v. Barton*, 2017 ABCA 216, rev'd 2019 SCC 33 (which comments were not disturbed by the Supreme Court of Canada):

> 92. Section 276 now sets out a mandatory and structured decision-making process when the defence wishes to adduce evidence of prior sexual conduct. It requires a written application by the defence to determine whether the evidence is admissible, usually before the trial begins; prohibits the "twin myths" reasoning; establishes the criteria to be applied to evidence adduced for non-prohibited purposes; and requires judges to provide reasons, and set out the allowable purposes, for any evidence ruled admissible.
>
> 93. At the application stage, an affidavit is required detailing particulars of the evidence sought to be adduced and its relevance to an issue at trial. This gives the

> Crown notice so they may prepare and respond to arguments about admissibility: R v Wright, 2012 ABCA 306 at para 8, 536 AR 320 [Wright]. If the trial judge does not screen out the evidence as clearly inadmissible, the written application is followed by an evidentiary hearing. To protect the complainant's equality and privacy rights, that hearing is held in camera in the absence of the jury. The affiant must submit to cross-examination limited to whether the proposed evidence is admissible. While evidence elicited through cross-examination cannot subsequently be used to establish guilt, it can be used to challenge credibility: R v Darrach, 2000 SCC 46 at para 67, [2000] 2 SCR 443 [Darrach]. In determining admissibility, a judge must take into account a list of factors, including the need to remove from the fact-finding process any discriminatory belief or bias: s 276(3) of the Code. Further, s 276.4 specifically requires a trial judge to instruct the jury on the uses that it may -- and may not -- make of sexual conduct evidence ruled admissible.
>
> [Emphasis added]

[94] That said, care must be taken to insure that the proposed evidence, in conjunction with the relevance which is asserted in the documentation filed by the applicant is capable of being used in a manner which accords with s.276(2).

[95] For example, any evidence which on *prima facie* scrutiny (which is to say, in the absence of cross-examination of the applicant, which does not occur until if and when a stage two hearing is held) appears to be incapable of passing muster under s. 276(2), must be barred.

[96] One example would include situations in which it is apparent (on the face of what is sought to be adduced) that the proffered "other sexual activity" invokes (in pith and substance) one of the prohibited twin myths. Another would arise where the evidence, even if accepted, is incapable of providing the accused with a defence, or even of being relevant to a defence.

Consent Revisited

[97] The presence or absence of consent will be integral to the Jury's determination in this trial. In such a context, when we talk about "consent", we know that:

i. it must be present at the time the sexual activity takes place;

ii. it must be with respect to the specific sexual activity in question; and

iii. in this case, it obviously must extend to participation by S.H. with both Mr. Williams and Mr. Ball.

[98] Any evidence that is being proffered for consent, would have to be relevant to one or more of these elements, otherwise, even if accepted it would be unrelated to what consent means at law. Similarly, if offered to bolster an honest but mistaken belief in communicated consent, and the potential evidence did not relate to one or more of these particulars, the mistake asserted would constitute a mistake of law, which is not capable of affording a defence under any circumstances.

[99] Particulars of the sexual encounters one to three between Mr. Williams and the complainant have been previously provided. Rather than go through a very detailed analysis of them, my conclusion is that none of them survives a stage one analysis.

[100] Indeed, Mr. Williams, in his submissions, focussed mainly on the November 17 – 18, 2017, encounters, and the events leading up to them. What he asserted with respect to the encounters prior to November 17, 2017, is that they occurred within the context of an evolving relationship between the parties, and that the jury would need to understand this in order to appreciate when and why the concept of three-way sexual activity first came up. Otherwise, the jury might be left with the impression that Mr. Williams popped the question "out of the blue" (if they accepted that be proposed it beforehand at all) on November 17, 2017, and draw some negative inferences with respect to his character, as a result.

[101] If I accepted this argument, it would make this evidence merely contextual, and only mildly so. It has nothing to do with whether SH consented to the activity (a threesome) on the night in question, nor can it inform whether Mr. Williams (or Mr. Ball) had laboured under the honest but mistaken belief that Ms. H. had communicated her consent, on the night in question, to that specific activity (involving himself and Mr. Ball).

[102] While some amount of context is always important if the jury is not to be left to reach its conclusions in a vacuum, I am mindful of the caution which appears in many cases. This caution is particularly apt when a party seeks to supply that context with details of "other sexual activity". It was put best by the court in *R. v. Goldfinch*, 2019 SCC 38, where, at para. 119, it was observed:

> 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" ... without a clear and precise identification of the 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".
>
> [Emphasis added]

[103] Any discussions that the parties had about the possibility of a threesome prior to November 17, 2017, occurred so long in advance of the acts which form the basis of the charges that he faces, as to have very little chance of assisting the jury with the matters upon which their focus is required in this case. They cannot assist the jury with respect to the issue of consent, or with respect to the validity of the defence of honest but mistaken belief that consent was communicated.

[104] The Crown concedes that the jury must be told that the two parties were not strangers, indeed, of the fact that they had a very close friendship prior to the night in question. Details of sexual encounters and communications prior to November 17, 2017, are not necessary in this respect. More importantly, they are simply not capable of being relevant. They also would, if admitted, provide a much more significant danger due to their potential to distract the jury from what should be their proper focus in this case.

[105] This lack of potential relevance persists even if we consider the evidence in encounters one to three as being proffered to establish a pattern by which acquiescence in the sexual activity has been signified in the past, insofar as it may relate to a defence of honest but mistaken belief in communicated consent.

[106] This is because I find nothing distinctive in the manner of these previous sexual acts, and/or the activity of either of the participants leading up to them, which would justify their inclusion in this context. It suffices to refer to *Goldfinch* (once again) at para. 64 in this respect:

> To the extent that Goldfinch sought to establish a pattern of behaviour, the "pattern" here was hardly distinctive; it would not be admissible as similar fact evidence (*Handy*, at paras. 82, 127 and 131). As I have noted, the limited admissibility of similar fact evidence protects the truth-seeking function of the trial by excluding evidence that is overly prejudicial to the accused. By imposing the same evidentiary standard under s. 276, neither the accused nor the complainant is denied equal protection of the law on the basis of lifestyle, character or reputation (Craig, "Section 276 Misconstrued", at p. 71).
>
> [Emphasis added]

[107] In contrast, the encounter between the parties on November 17 – 18, 2017, the interactions of the parties that date, the consensual sex that the two had prior to

the threesome, the manner in which Tyler Ball came to enter the picture, the observations of various witnesses who came into the room at various stages either during the one on one sex or while all three parties were in the room, all have potential bearing on the issues of: 1) communicated consent; 2) honest but mistaken belief in communicated consent; and/or 3) the presence of bruising in the area of S.H.'s hips/buttocks, which the Crown apparently intends to contend was inflicted during the threesome.

[108] To try this case, the jury will need to understand just what went on November 17 – 18, 2017. Some of what Mr. Williams has described under the rubric of "my fourth sexual encounter with Ms. H." beginning at para. 30 of his affidavit, therefore passes muster at stage one, even though the Crown is correct, in that the one on one sex which preceded the threesome activity is indeed "prior sexual activity" between one of the two accused and the complainant.

[109] To elaborate. First, it has been noted that evidence of bruising in the area of Ms. H.'s hips and buttocks will be adduced as part of the Crown's case. Presumably this will be to support the inference that this happened during her non-consensual encounter with the two men that evening, while she was being held down. Mr. Williams (the Crown concedes, although counsel for Ms. H. does not) should not be precluded from providing evidence that this occurred during "spanking", which arose as part of their consensual one on one sexual encounter, immediately before Mr. Ball arrived in the room.

[110] Moreover, Mr. Williams' evidence will be that he discussed with S.H. the possibility of having a threesome on more than one occasion that evening. Advance consent is no consent, but the context and timing of these conversations, beginning with the one had that evening not very far removed in time from when Mr. Ball and the other males entered into his room, the second one (which he will testify occurred in the presence of the others (para. 41), when she again consented) the third one when just Mr. Ball remained in the room, and the final time when Mr. Williams says he asked her after sexual activity between herself, Mr. Williams and Mr. Ball had been interrupted, (if accepted) would all be relevant to whether consent was initially given and ongoing, and/or, whether having been given, had been withdrawn.

[111] The accused(s) must be permitted to explain the circumstances that existed when each alleged "yes" "sure" or "I'm fine" was elicited. Their proximity to or during the so called threesome bears facial relevance to whether consent, if previously given when the two were alone, was withdrawn before the three-way

activity was engaged, after Mr. Ball entered the room, and/or when the female RA spoke to SH, before M.M.K. entered the room for a second (and final) time.

[112] If he were not able to do this, the prejudice that would be sustained by the accused would lie in the truncated, excised version of what went on that evening that would remain of this narrative. It would significantly hamper his ability to make a full answer and defence on the basis of actual consent, as well as, secondarily, of an honest but mistaken belief that consent had been communicated.

[113] As noted in *Goldfinch*:

> 65. Finally, Goldfinch submits that the sexual aspect of a relationship may be relevant to the coherence of the accused's narrative, and by extension, credibility. There will, of course, be circumstances in which context will be relevant for the jury to properly understand and assess the evidence…

[114] I am aware that there is a downside for the complainant as well. However, both accused face the spectre of a guilty verdict. To the extent that a probative value and prejudice analysis is required at stage one, and without the benefit (as of yet) of a hearing (including cross-examination) on this evidence, and having considered the other provisions of s. 276(2) as best I can without the benefit of this cross, I found that all of the sexual activity which occurred on November 17 – 18, 2017, and the communications which preceded them (on those dates) constitute evidence that is both "relevant to an issue at trial" and "capable of being admissible under s. 276(2)".

[115] In effect, the details of the fourth (consensual) act between Mr. Williams and S.H., which was succeeded by the three-way activity in question (the fifth act) on the night of November 17 – 18, 2017, and the events of November 17, 2017, which led to the sexual activity that occurred that evening, remain for consideration and proceed to stage two, and a *voir* dire will therefore be held, in relation to this.

[116] None of the rest of the "other sexual activity" proposed by Mr. Williams has made the cut, so to speak.

Stage Two

[117] It was during this stage that the cross-examination of Mr. Williams on the contents of his affidavit ensued.

[118] Much of this consisted of elaboration upon his affidavit evidence.

[119] Of note is the fact that, having ruled out the evidence of what went in the first three earlier encounters, Mr. Williams' evidence as to how the practice of spanking S.H. had arisen or evolved, did not survive stage one. Some questions were put to Mr. Williams during the v*oir dire* on cross about the spanking that happened during the November 17 – 18, 2017 encounter, not only as to the areas of S.H.'s body on which spanking occurred, but how many times he had spanked (or "hit her" in the phraseology employed by the Crown – Mr. Williams couldn't say) and who raised the idea on that occasion ('no one raised it, I did it").

[120] Moreover, I noted that Crown asked, "she didn't ask you to hit her "[did she?]". In my oral "stage one" reasons, I pointed out that s. 276 applications are fluid and dynamic, in a sense. I am not precluded from revisiting, for example, my stage one analysis, depending upon how the evidence should later come out in front of the jury.

[121] As I mentioned to Counsel during Mr. Williams' cross, I might have to revisit details of the first three encounters if the questioning of Mr. Williams before the jury was left the way it was at the s. 276 (stage two) hearing – as it could result in actual prejudice to the accused if the jury were being left with the impression that this spanking was something he just started doing out of the blue that evening. In such an event, the prior evidence that this was part of the routine or pattern that they followed on prior occasion(s) will become relevant. I simply pointed this out as a caution.

[122] At present, I consider the probative value of the evidence of what occurred on the evening of November 17 – 18, 2017. I balance it against the degree of violation of the complainant's privacy and dignity that is involved, and the need to scrutinize the proffered evidence rigorously for conformity with the s. 276(2) regime.

[123] Even though the Crown agreed (at stage two of this hearing) that "most of" what went on November 17 – 18, 2017, should be admitted at trial, it pointed out that the Crown is unable to agree to waive the s. 276(2) analysis. Scrutiny of this evidence by the Court is always mandatory in every case where either side seeks to adduce "evidence of other sexual activity".

[124] Having considered the evidence elicited during Mr. Williams' cross, I am even more firmly of the view that evidence of (1) what occurred on November 17, 2017 which led up to the one on one sex between S.H. and Mr. Williams on that evening (2) the sexual acts themselves which occurred this consensual encounter, and (3) the communication between the parties, including communicating with

respect to the possibility of a threesome, are all inextricably linked to the charges with which the two accused must contend.

[125] How does Mr. Williams describe how Mr. Ball came to enter the room if he is not to say what he and S.H. were doing just prior to his arrival? How also does he provide his evidence about the two entrances of M.M.K. into the room, since (at least one evidentiary version of) M.M.K.'s first visit came when there was only Mr. Williams and SH there? How does he explain what he said when he first raised the issue of a threesome that evening and how this flowed into and provided context for the subsequent discussions that were had in relation to the topic? More specifically, how does he explain the second discussion that evening, this one just after Mr. Ball and the others had come into the room, without having mentioned his claim that he and S.H. had been having one on one sex just before that happened? Finally, how does he attempt to refute the inference that the Crown will seek to have the jury draw about the bruising in the back of the complainant's hips?

[126] The Crown contends that on November 17, 2017, the communication between Mr. Williams and S.H. about a threesome, when only the two of them were present, should not be admitted. They say this would be tantamount to making advance consent potentially relevant rather than "consent [given] at the time of the activity in question".

[127] With respect, it is possible to view the several instances of discussions of this nature that evening, the first of which is said to have occurred while the two were alone, as really one discussion which was interrupted on several occasions by further sexual activity, people entering the room, and the like. Together, if accepted, they would be capable of providing evidence to support both accused's assertions

[128] Consider that, during their first (consensual) encounter that evening, Mr. Williams argues that the first conversation establishes that S.H. was interested in a threesome that evening. The second, occurring while Mr. Ball was in the room with them, he will argue establishes that she was interested in having a threesome with him and Mr. Ball specifically. The third, after he had exited from the room for a short interval and returned, during which interval Mr. Ball and S.H. were alone in the room, he will say reaffirmed her consent to Mr. Ball as the third partner to an episode that would be occurring almost instantly.

[129] And the fourth, which he says occurred after the RA came in, conversed with S.H., and then left, in which she allegedly indicated that she was interested in

resuming the threesome activity (which he said had begun before the RA entered the room) would confirm that she had consented to the specific nature of the activity which had unfolded.

[130] Taken together, they are (if accepted) capable of demonstrating all of the necessary indicia of consent set out under s. 273.1, or failing that, of explaining why Mr. Williams. honestly but mistakenly thought that all of the necessary criteria for consent were met.

[131] This evidence survives s. 276(2) scrutiny, and will be admissible at trial, but only for the purposes previously noted.

Gabriel, J.