SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. S.W.*, 2020 NSSC 320

Date: 20201105
Docket: CRBW 486301
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

S.W.

DECISION

RE: ADMISSIBLE EVIDENCE HEARING

PUBLICATION BAN: s. 486.4 and s. 539.1 of the *Criminal Code*

Judge: The Honourable Justice Jamie Campbell

Heard: October 19, 2020, in Bridgewater, Nova Scotia

Counsel: Sharon Goodwin, for the Crown
Alan Ferrier, Q.C., for the Defence
Michelle James, for the Complainant

By the Court (orally):

[1] S.W. has been charged with committing sexual assault. The incident is alleged to have taken place on September 23, 2017. S.W. has made an application under subsection 278.93(4) of the *Criminal Code* to have a hearing under section 278.94 to determine if evidence of the complainant's prior sexual activity is admissible under subsection 276(2).

[2] The process under section 278.93 requires the applicant to file an application in writing, setting out the detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial. A copy of the application must be given to the prosecutor and the clerk seven days before the application is heard unless the judge orders otherwise. The judge then must determine whether the evidence sought to be adduced is capable of being admissible under subsection 276(2). That first stage hearing is based on the material filed with the application. It is not limited to a consideration of some of the factors set out in section 276. The scope of consideration is the same. The differences are first, that it is based only on the written materials filed and second that the test is whether the evidence sought to be introduced is "capable" of being admissible.

[3] Counsel were heard on the application on October 19, 2020. The complainant and her counsel did not have standing to make representations in the hearing under section 278.93(4). The complainant was given notice of the hearing and her counsel was present but did not take part. She was available for the second stage hearing under section 278.94 in the event that the hearing took place immediately following. In this case I have found that the evidence sought to be adduced was capable of being admitted under section 276. The application proceeded immediately to the second stage, under section 278.94. The issue at the second stage is whether the evidence of prior sexual activity should be admitted. That is a more onerous test.

[4] Counsel appeared on behalf of the complainant to argue that the evidence with respect to her client's previous sexual activity should not be admitted.

[5] Subsection 276(1) sets up an absolute bar to the admission of evidence of the complainant's sexual history for the purpose of seeking to make the inference that the complainant was either more likely to have consented to sexual activity or is less worthy of belief. Evidence of other sexual activity is presumptively inadmissible unless the accused person can show that the evidence is admissible

under subsection 276(2). The evidence must be identified as relating to specific instances of sexual activity, must be relevant to an issue at trial and must have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice". In making the determination the judge must consider several factors set out in subsection 276(3). Those factors include the right of the accused to make full answer and defence, whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case, the need to remove from the fact-finding process any discriminatory belief or bias, and the potential prejudice to the complainant's personal dignity and right of privacy.

[6] The wording of subsection 276(2) sets out four requirements for admissibility. Those are, again in summary, the absence of twin myth reasoning, relevance to an issue at trial, the specificity of the instances, and the evidence having significant probative value. Subsection 276(3) sets out factors to be taken into account in determining whether the requirements in subsection 276(2) are met. None of those factors would relate to whether twin myth reasoning is being advanced. None of those factors would relate to whether what is sought to be adduced is evidence of specific instances of sexual activity. It either is, or it is not. Relevance and probative value however may be assessed having regard to those factors. If the evidence is highly relevant and has a high level of probative value it may then offer a reasonable prospect of assisting in arriving at a just determination even if it is evidence that may directly affect the complainant's right to personal dignity and privacy.

[7] The consideration of the evidence is not a matter of checking factors but a more holistic assessment of how significant the probative value of the evidence is to a relevant issue at trial and how invasive that evidence is of the complainant's privacy rights. Highly probative evidence may justify a level of intrusion into the complainant's private information that less probative evidence would not justify. It is important then for counsel to offer a clear statement of what evidence is sought to be adduced and the proposed purpose of that evidence. This is not the time for defence counsel to try to preserve the surprise factor in cross-examination. It is critical for the court to know what precisely is proposed to be adduced regarding other sexual activity of the complainant.

[8] The applicant's materials are brief. Those materials, along with the briefs filed by the Crown and counsel for the complainant are the only materials that the court has, to provide any context. This is not a situation in which an application is

made mid-trial and the court is aware of all the evidence to that point. The applicant is required to provide context that would allow the court to appreciate why pieces of evidence are material, relevant and have significant probative value.

[9] S.W.'s counsel wants to be able to ask about conversations that the complainant had with various people about her pregnancy and the termination of it. He wants to be able to ask about the use of condoms and conversations about that issue. He wants to be able to ask whether certain individuals knew that the complainant and the accused were engaging in sexual activity before the date of the alleged offence.

[10] In support of that application he has filed the affidavit of S.W. In that affidavit S.W. says that he and the complainant were involved in a relationship from March 2016 to December 2017. He says that he believed that the complainant's mother was unaware of that sexual relationship until approximately March 2018 and that the complainant's mother was not aware of her abortion until March 2018.

[11] S.K. notes that he had reviewed the transcript of a statement taken from a person named K.D. The affidavit does not identify who K.D. is in relation to either the complainant or the accused. Counsel's brief filed in the matter confirms that K.D. was a friend of the complainant. K.D. told the police that the complainant had told her that she had an abortion and that she "thought it would have been from that time, because that was the only time they didn't use a condom". K.D. said that the complainant told her that she was 13 weeks into the pregnancy when she had the abortion.

[12] S.W. says in his affidavit that he and the complainant rarely used condoms and never used them after the summer of 2017.

[13] S.W. refers to the complainant's statement to the police from October 6, 2019. In that statement the complainant says that she spoke to one of her friends and then called "him", presumably S.W., and told him that the relationship was over. She says in the statement that he asked why, and she told him that "what he did wasn't right". She also found out that she was pregnant and though she could not recall for certain believes she told him that during the phone call. She says that the pregnancy was not due to that evening.

[14] S.W. in his affidavit asserts his belief that the complainant is "fabricating or twisting the events of September 23, 2017, to colour an otherwise wonderful

relationship because her mother was not aware of our sexual relationship, her pregnancy and her abortion until well in 2018 when the relationship between the complainant and I was over". He says that the complainant did not have a good relationship with her mother during the course of their involvement and the complainant feared her mother.

[15] S.W. says that the pregnancy, abortion and the use or non-use of condoms are relevant to the credibility of the complainant.

[16] Reading the affidavit, one is left trying to piece together what the point might be. Its 15 paragraphs are the only pieces of evidence on the application. S.W. was not cross-examined. There were no other affidavits filed. Once the evidence is heard at trial there may be more context within which to consider the information. At this stage in the process it is an assertion of relevance for which the logical paths are not clearly laid out for the most part. The probative value in that case can hardly be assessed at all.

[17] S.W.'s counsel filed a brief with the application. The brief sets out the law. It does not provide the logical path for the relevance of the evidence of previous sexual activity sought to be adduced. The brief says that the evidence related to the pregnancy, the abortion and the non-use of condoms "is far more than contextual and will be relevant and probative to the Court's ultimate decision as to what happened on the 23rd of September, 2017". The brief goes on to say that the evidence will be relevant and probative "to the complainant's motive to fabricate" and will also be relevant to the issue of "prior and post inconsistent statements". The applicant says that it is further relevant to the specific defence offered.

[18] The brief leaves it to the reader to speculate on how the evidence about the complainant's pregnancy, the termination of that pregnancy and the knowledge of others about their relationship, will be relevant much less substantially probative of any of the issues at trial. The suggestion set out in the oral argument was that because the complainant was scared of her mother and had a bad relationship with her, she fabricated the sexual assault to explain her pregnancy and the termination of the pregnancy to her mother when her mother found out about it in 2018. There is no evidence beyond S.W.'s assertion however that the complainant had kept the sexual nature of her relationship with him from her mother or that she had any specific motive to "explain" her pregnancy as a sexual assault. It is not clear why, presumably as an adult, the complainant would feel any compulsion to "explain" anything.

[19] The complainant specifically told the police that she did not become pregnant as a result of sexual contact on September 23, 2017. The evidence of the complainant's pregnancy and when she knew she was pregnant and who she told and when, is not substantially probative with respect to any issue at trial. It is not substantially probative about the complainant's credibility.

[20] To the extent that it might be regarded as having some potential to be relevant, that is outweighed by concern about the privacy rights and dignity of the complainant and the concern that the use of such sensitive information would act as a disincentive to complainants to come forward. Abortion remains a highly sensitive matter. Of course, women have the right to speak freely about it, but they also have a right to maintain their privacy in relation to such a deeply personal decision. Dealing with the complainant's pregnancy and the termination of that pregnancy would be a gross intrusion of her right to privacy and in the context of this case, the extent of that intrusion vastly exceeds whatever probative value might speculatively be assigned to it.

[21] The second area of questioning relates to the use or non-use of condoms. S.W.'s affidavit refers to a statement by K.D. that the complainant told her that the abortion was from "that time because they didn't use a condom". The complainant told the police however that the pregnancy was not due to that evening. The Crown does not allege that the pregnancy arose from sexual contact on September 23, 2017, when the sexual assault is alleged to have taken place. If the allegation was that the pregnancy arose from that contact the issue of condom use would be relevant. The only relevancy asserted here is that the complainant told the police that the pregnancy did not arise from the September 23, 2017 sexual contact and told her friend that her pregnancy was from that time.

[22] The credibility of the complainant and the reliability of her testimony will be a critical issue at trial. Inconsistent statements are a way for counsel to test both credibility and reliability. The issue is not about whether condoms were used and whether a pregnancy arose from the September 23, 2017 sexual contact. It is about the precise issue of whether the complainant told one thing to the police and something different to her friend, K.D., as disclosed in K.D.'s statement to the police. That issue is substantially probative and is not outweighed by concerns of privacy and the preservation of the dignity of the complainant.

[23] The court is obliged to manage the scope of cross-examination on these issues. My intent is to fulfill that obligation assiduously. Defence counsel may

cross-examine K.D. and the complainant on the potentially inconsistent statements about the use of condoms. That is not intended to allow for a broad scope of cross-examination on pregnancy and abortion. It is limited to that potential inconsistency. That area of questioning has probative value that is not substantially outweighed by other considerations.

[24] The application is granted in part. Counsel may ask questions that relate directly to the potentially inconsistent statements of the complainant and K.D. The issues of pregnancy and abortion for the purpose of addressing a motive to lie on the part of the complainant have not been shown to have significant probative value that is not outweighed by the rights of the complainant to her privacy and personal dignity and the concern that other complainants may be deterred from making complaints in sexual assault matters.

Campbell, J.