SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. JM*, 2020 NSSC 321

Date: 20201113
Docket: 494685
Registry: Halifax

Between:

Her Majesty The Queen

v.

JAM

Restriction on Publication – Sections 486.4 & 278.95 of the *Criminal Code*

Decision on s. 276 Application

Judge:	The Honourable Justice Peter P. Rosinski
Heard:	September 21 & October 28, 2020, in Halifax, Nova Scotia
Counsel:	Constance MacIsaac, Counsel for the Crown Joshua Nodelman, Counsel for the Accused Carbo Kwan, Counsel for the Complainant

By the Court:

Introduction

[1] JM is charged that on August 6, 2018, he did unlawfully commit a sexual assault on KB contrary to section 271 of the *Criminal Code* ["*CC*"]. KB alleges that by agreement they were in the same bed, and while she was asleep, JM vaginally penetrated her. He denies having sexually touched her. JM claims that KB mistakenly believed upon waking that he had vaginally penetrated her, as she was waking immediately after having a recurring nightmare about her previous unconsented-to sexual activity.[1]

[2] He has made an application pursuant to sections 276 and 278.93 (1st stage) 278.94 (2nd stage) *CC* to be permitted to present at his trial evidence that the complainant has engaged in sexual activity other than the sexual activity that forms the subject matter of the charge (i.e. the previous unconsented to sexual activity, and more specifically the manifestation thereof in her recurring nightmares).

[3] I have found the proposed evidence to be admissible – however present circumstances suggest that I should limit the inquiries to only what is necessary to

[1] JM is entitled to the procedural changes to the relevant sections herein which were effective as of December 13, 2018 – see footnote 2 *R v Brown*, 2019 NSSC 177. Pursuant to section 278.94(4) *CC* I am providing these reasons.

permit JM full answer and defence given the countervailing privacy and dignity interests of KB. Therefore, I expect I will limit the evidence that JM may give, and the permissible questioning in the cross-examination of KB.

Background

[4] More specifically, KB alleges that they were sharing a bed in her mother's home on the late evening of August 5 into the morning of August 6, 2018, where there had been no sexual activity whatsoever to the time she fell asleep, when as JM puts it in his brief, she asserts that she "awoke to find JM's penis fully inserted into her vagina. She yelled at him to stop, jumped up, and went to the washroom to don pants. [She] proceeded to exit the washroom and start yelling at [JM], thereby rousing the two other individuals in the residence. Her mother came into the living room and asked [JM] to leave; he immediately acceded to this request. Police were called, and arriving on the scene, found the complainant on the washroom floor in tears asking not to be touched. Upon police's urging, the complainant agreed to be taken to a Sexual Assault Nurse Examiner ["SANE"] at the Queen Elizabeth II Hospital."

[5] JM's position is that *he did not touch KB in a sexual manner* as she asserts.

[6] JM argues that he should be permitted to cross-examine her at trial in relation to recurrent nightmares that she had "about a time when she was sexually assaulted in junior high school…" because "the nature of my relationship with [KB] between approximately the time we met [mid to late 2017] and, with a few interruptions, up to the night in question was such that we regularly slept in the same bed. During that time, [KB] would wake up in the night so noisily as to rouse me as well. These incidents occurred almost every night, usually between about midnight and 1 AM. At such times, I would ask [KB] what was going on. [KB] would respond she had just had a nightmare. She would further advise me the nightmares were about a time she was assaulted in junior high school. She would further advise me that the nightmare "seemed real" and that "it felt like it was happening again". The first time such an incident occurred, I attempted to comfort [KB] by touching her shoulder. [KB] became agitated and asked that I not touch her; I respected her wishes. On this same occasion, [KB] first related that she had been sexually assaulted years before in junior high school by another male individual. In my direct observation, [KB] was at such times acting jumpy and breathing heavily… I do recall being woken once more by [KB] on the date of the alleged incident in this proceeding. To the best of my recollection, this particular incident also occurred roughly between midnight and 1 AM."

[7] In summary, his position is that he should be permitted to cross-examine KB, specifically regarding:

1. "the bare fact the nature of the complainant's prior relationship with the accused was such that they would sleep in the same bed"; and
2. [in relation to] the complainant's having confided to [JM] she had been the victim of a sexual assault committed by another individual in the past."

[8] Effectively, he says that he should be permitted to ask her about her nightmares, in order to be in a position to argue the *reliability* of her claim that he vaginally penetrated her as she claims is seriously in question.

Summary of conclusions

[9] Pursuant to section 278.93(4) *CC*, I concluded that JM has met the test at stage I, including that the evidence sought to be adduced is *capable of being admissible* under subsection 276(2) CC.[2]

[2] Although the wording in section 276 is unclear as to whether Parliament intended the subsection 276(3) factors to be considered at stage I, since it uses the words "in determining whether evidence is *admissible* under subsection (2)" which may be seen to exclude a consideration of whether the evidence is "capable of being admissible under subsection 276(2)" per section 278.93(3), I find it more in keeping with the intent of the legislation that I consider section 276(3) factors at stage I.

[10] I then proceeded to hold a hearing under section 278.94 *CC* to determine whether the evidence *is admissible* under section 276(2) *CC*. I concluded that the evidence:

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

[either *that KB* is more likely to have consented to the sexual activity that forms the subject matter of the charge or *is less worthy of belief*- I accept that it is not adduced for such purposes- see para. 2 in *R v RV*, 2019 SCC 41];

2. is relevant to an issue at trial

[it is relevant to the *reliability* of KB's anticipated testimony that, upon waking, she believed that JM was/had been vaginally penetrating her- the honesty and reliability of the witness's testimony each require consideration in assessing their so-called "credibility"- *R v Perrone*, 2015 SCC 8 ; and the reasons in *R v Morrissey*, (1995) 97 CCC (3d) 193 (Ont. CA.) where Justice Doherty referenced them as "veracity and accuracy" at para. 33];

3. is of specific instances of sexual activity

[though the unconsented-to sexual activity that she says occurred in junior high school is not directly in issue, that unconsented-to sexual activity is indirectly brought into issue, as is it has relevance by virtue of JM's sworn evidence in his affidavit regarding KB's repeated references to the *nightmares arising from the junior high school unconsented-to sexual activity* that she experienced in his presence as: they "seemed real"; and that "it felt like it was happening again"- see *R v Goldfinch*, 2019 SCC 38 at paras. 53-4 and 65.]; and

4. has *significant* probative value that is not *substantially* outweighed by the danger of prejudice to the proper administration of justice

[the evidence to be adduced has *significant* probative value because "the ability to cross-examine the complainant [is] fundamental to his right to make full answer and defence" [*RV* at paras. 7-8] so that JM has the opportunity to put forward an evidentiary basis for his denial of the *actus reus* argument – i.e. that KB was mistaken about what she believed had happened, not that she is purposefully being untruthful in stating her belief, while recognizing that doing so "treads on dangerous ground, raising both dignity and privacy concerns. Judges must tightly control such cross-examination to minimize of those risks. The accused's right to make full answer and defence must be balanced with other interests protected in section 276(3)."- see also para 69 *Goldfinch*]

[11] Therefore, I have concluded that I will permit JM to elicit evidence (in cross-examination of KB and in his own direct testimony should he testify), in relation to when the purported sexual activity that caused KB's nightmares to occur happened, the general frequency of nightmares in relation thereto, and whether she had such a nightmare on August 5/6 2018 while in bed with JM, including the surrounding circumstances.[3]

[12] As suggested in the reasons of Justice Karakatsanis in *R v RV*, 2019 SCC 41, I intend to permit targeted cross-examination of KB, well aware that I must strike a delicate balance between giving counsel sufficient latitude to conduct effective cross-examination and minimizing any negative impacts on KB while ensuring the fairness of the trial process. Consequently, the proposed questions to be put to KB will be carefully scrutinized by the court, and this ruling may be re-assessed based upon the answers received during trial.

Stage 1-The arguments made regarding whether the purported evidence sought to be adduced is *capable of being admissible* under subsection 276(2) CC[4]

Position of the Crown

[3] JM testified in the *voir dire* that both he and KB were smoking cannabis products before they went to bed that night, and that he was a regular user of cannabis, and its effect on him that evening was unusual as he felt it made his "body go numb"- he questioned whether something psychoactive had been added to it.

[4] The facts in support of the Defence and Crown positions at stage I of this s. 276/278.93 *CC* bifurcated *voir dire* were presented by agreement through the sworn affidavit of JM upon which he was not cross-examined, and relevant contextual representations of counsel.

[13] The Crown strenuously argued that, bearing in mind that this evidence is presumptively inadmissible, and the burden of proof is upon an accused, the evidence is not capable of being admissible because:

1. the purported "detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial" per s. 278.93(2) *CC* disclosed no connection between the complainant's sexual history and the accused's defence per the reasons in R v *Darrach,* 2000 SCC 46 at paras. 53-56 (see also *R v Goldfinch*, 2019 SCC 38 - Justice Moldaver's concurring reasons to the effect that "the accused must demonstrate at a minimum that the evidence sought to be introduced goes to a legitimate aspect of his defence and is integral to his ability to make full answer and defence" – at para. 83 and 94-95)

[In response JM effectively argues that s. 276(4) *CC* states "… Sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature" (i.e. KB's recitation of the fact of the earlier non-consensual sexual activity that led to her nightmares) and that he has provided "sufficiently detailed information to permit the judge to apply the regime.": *R v RV*, 2019 SCC 38 at

para. 6; and at para. 49. I find that there is sufficient detail to allow the Crown (and the complainant KB) a fair opportunity to respond.]

2. the evidence is being adduced for the purpose of supporting the prohibited inferences in s. 276 (1) *CC*:

    a. "JM is asking this court to accept that because the complainant may have been sexually assaulted in the past and possibly dreamt of the same, she was somehow confused or 'dreamt' up the allegations before the court which is at its core suggesting the complainant is less credible";

    b. in response to JM's position that 'the questioning seeks only to explore whether this trauma history, in the context of her sleeping next to JM gave rise to a perception of a new assault occurring' the Crown argues this argument can be restated as: "a complainant who accuses two persons of sexual impropriety occurring at different times and in different circumstances, is more likely to be lying about either or both than a complainant who accuses only one person. This reasoning brushes uncomfortably close to what section

276(1)(b) proscribes and is countermanded by binding precedent.";

c. "Supreme Court jurisprudence distinguishes between applications which seek to undermine general and specific credibility. The Crown submits the application herein seeks to undermine the complainant's general credibility as it relates to the matter before the court which is prohibited."

[Collectively these arguments are not persuasive. JM seeks to draw a distinction between KB's anticipated testimony's truthfulness and reliability. In essence, he wishes to test by cross-examination whether when she woke out of a sleep, she may have mistakenly believed that JM was vaginally penetrating her while she was asleep. Her general credibility is not under attack, nor is JM suggesting reliance upon either of the twin myths.]

3. The jurisprudence "directs [that] sexual history cannot support a denial of sexual assault" [see *R v Darrach*, 2000 SCC 46, at paras. 49 – 50; and *R v MT*, 2012 ONCA 511]; and that there is nothing novel or distinguishable about the circumstances in JM's case. The Crown notes that there are distinct differences between and JM's anticipated

> evidence in the allegations before the court – i.e. that he was aware KB had been sexually assaulted before and he was subsequently present for and witnessed her having recurring nightmares regarding the prior assault from which she awoke in fear and refused to allow him to touch her –*yet* in contrast to his claim of events of August 6, 2018, on each of those earlier occasions the complainant never awoke to suggest he was the individual who had previously sexually assaulted her, nor did she claim that he was presently sexually assaulting her.

[On the other hand, the court stated at para. 49 in *RV*: "As a matter of logic, evidence tendered to rebut Crown-led evidence implicating the accused will be relevant to the accused's defence." The rationales that support the prohibition the Crown cites above are not determinative in JM's circumstances.]

4. "dreams of prior sexual assault [are] not specific instances of sexual activity" whereas "the prior sexual assault is an instance of sexual activity";

[The nightmares are rooted in a previous instance of unconsented-to sexual activity experienced by KB – I conclude they are of a nature that qualifies in these

circumstances as "instances of sexual activity" particularly since "sexual activity" as defined in s. 276(4) *CC* "includes any communication… whose content is of a sexual nature" and that KB repeatedly communicated to JM an instance of previous sexual activity]

5. as a matter of relevance, the evidence of the extent of the previous relationship between KB and JM should be limited to "what evidence is legitimately required to be known" about that in order to permit "for full answer and defence", and that need not go further than necessary – eg. by "specifying the parties to the relationship, the nature of that relationship and the relevant time period" per *Goldfinch* at para. 54;

[JM would be content to limit his cross-examination of KB to targeted questions regarding how many times KB recalls sharing a bed with JM in a relevant time period and waking up in the night as a result of nightmares associated with the unconsented-to sexual activity she experienced in junior high school];

6. alternatively the Crown submits that the prior sexual assault and associated dreams are a collateral issue at trial and "the case law is replete with examples of defendants seeking to cross-examine complainants about prior sexual assaults to demonstrate confusion

between the two instances" which have been refused by courts – for example, *R v ARB*, 2000, 113 OAC 286 (per Finlayson and Abella JJA for the majority, and Moldaver JA in dissent).

[However, I must note that *ARB* was distinguished by the court in *R v CF*, 2017 ONCA 480:

> 58 *The collateral fact rule prohibits calling evidence solely to contradict a witness on a collateral fact. The rule does not impact the scope of cross-examination, but rather limits what contradictory evidence can be called to refute a witness's answer.* The rule seeks to preserve trial efficiency and avoid confusion and distraction by preventing the litigation of issues that have only marginal relevance. See generally, David Watt, *Watt's Manual of Criminal Evidence*, (Toronto: Thompson Reuters Canada, 2016), at p. 316.
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> …
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> 60 Nevertheless, in the circumstances of this case, the trial judge did not err in admitting the rebuttal evidence. *The collateral fact rule is not absolute.* As the Supreme Court recognized in *R. v. R.(D.)*, [1996] 2 S.C.R. 291, *evidence that undermines a witness's credibility may escape the exclusionary reach of the collateral fact rule if credibility is central to the case against an accused.*
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> …
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> 63 *This court has twice refused to permit an accused to cross-examine a complainant on prior sexual assault allegations and then call the alleged perpetrators to contradict the complainant, on the basis that the evidence would offend the collateral fact rule*: *R. v. Riley* (1992), 11 O.R. (3d) 151, leave to appeal refused, [1993] S.C.C.A. No. 26, [1993] 2 S.C.R. x; and *R. v. B.(A.R.)* (1998), 41 O.R. (3d) 361, aff'd 2000 SCC 30, [2000] 1 S.C.R. 781.
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> 64 However, *the concerns underpinning the decisions in Riley and B.(A.R.) do not arise in this case. The prior sexual assault allegations in those cases were made against third parties, and the court was rightly concerned about confusing the process by introducing a litany of marginally relevant issues for the trier of fact to decide.* As the majority in *B.(A.R.)* noted, at p. 366:
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> > [T]he tactic of the defence is directed to creating confusion by having the jury consider not one criminal case but four or five in the hope that by discrediting at least

> one of her allegations of sexual abuse, he can raise a reasonable doubt as to the Crown's case on the charges on which it elected to proceed.

In my view, the circumstances of the case at Bar do not give rise to serious collateral fact issues.]

7. taking into account the factors in section 276(3) *CC*, "the proposed evidence is such that [it] would distort the truth seeking process and has a high potential to take away from the truth seeking function of the trial by looking at sexual activity that did not occur contemporaneously with the allegation. The complainant is entitled to protection of her privacy and personal dignity… It is reasonable to find the impact of the evidence being adduced would certainly have a chilling effect on the reporting of sexual offences… When the prejudicial impact of the proposed evidence is considered, the factors weigh in balance of not admitting the proposed evidence. Disallowing the proposed evidence does not impair the accused's ability to make full answer and defence. The accused's right to a fair trial will not be infringed if the proposed evidence is not admitted."

[As I have alluded to above, central to JM's defence is his anticipated testimony that he did not vaginally penetrate KB as she claims, and that she was mistaken

about what she believed had happened just before, and was happening at the time, she unexpectedly woke out of a sleep between midnight and 1 a.m., August 6, 2018 – specifically that her mistaken belief directly arose from the presence of her recurring nightmare regarding the unconsented-to sexual activity she experienced in the past.]

[14] I also bear in mind, as the Court in *RV* stated, albeit in relation to the pre-December 13, 2018 amendments:

> 39 Generally, a key element of the right to make full answer and defence is the right to cross-examine the Crown's witnesses without significant and unwarranted restraint: *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at paras. 1 and 41; *Osolin*, at pp. 664-65; *Seaboyer*, at p. 608. The right to cross-examine is protected by both ss. 7 and 11(*d*) of the *Charter*. In certain circumstances, cross-examination may be the only way to get at the truth. The fundamental importance of cross-examination is reflected in the general rule that counsel is permitted to ask any question for which they have a good faith basis -- an independent evidentiary foundation is not required: *Lyttle*, at paras. 46-48.
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> 40 However, the right to cross-examine is not unlimited. As a general rule, cross-examination questions must be relevant and their prejudicial effect must not outweigh their probative value: *Lyttle*, at paras. 44-45. In sexual assault cases, s. 276 specifically restricts the defence's ability to ask questions about the complainant's sexual history. By virtue of s. 276(3), full answer and defence is only one of the factors to be considered by the trial judge; it must be balanced against the danger to the other interests protected by s. 276(3). These additional limits are necessary to protect the complainant's dignity, privacy and equality interests: *Osolin*, at p. 669; see also *R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 61-68. They also aim to achieve important societal objectives, including encouraging the reporting of sexual assault offences: s. 276(3)(b).
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> 41 Thus, the fact that the accused's ability to make full answer and defence requires that the complainant be cross-examined is not the end of the analysis. The scope of the permissible questioning must also be balanced with the danger to the other interests protected by s. 276(3), including the dignity and privacy interests of the complainant.
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> …

> 60 Even where proposed evidence is sufficiently specific and relevant, cross-examination about a complainant's sexual history is only allowed if the proposed line of questioning has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice": s. 276(2)(c). This balancing requires judges to pay careful attention to the factors listed in s. 276(3) in assessing the potential impact of the evidence on the accused, the complainant and the administration of justice.
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> 62 *While R.V. did not know the answers to the questions he sought to ask, I agree with Paciocco J.A. that "uncertainty of result does not deprive a line of questioning of its probative value":* para. 64. The application judge should not have considered the probability that R.V.'s questioning would be successful, but rather whether the answers would be probative. *Because the answers had the potential to undermine or confirm important Crown evidence, their probative value was high.* In my view, two factors related to the probative value of the evidence required that some form of cross-examination of the complainant be allowed:
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> > (a) the interests of justice, including the right of the accused to make a full answer and defence; [and]
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> > ...
> >
> > (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case.
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> …
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> 64 *Simply put, the more important evidence is to the defence, the more weight must be given to the rights of the accused.* For example, the need to resort to questions about a complainant's sexual history will be significantly reduced if the accused can advance a particular theory without referring to the complainant's sexual history. But in other circumstances -- *where challenging the Crown's evidence of the complainant's sexual history directly implicates the accused's ability to raise a reasonable doubt -- cross-examination becomes fundamental to the accused's ability to make full answer and defence and must be allowed in some form: Mills*, at paras. 71 and 94.

[15] Having found the proposed evidence capable of being admissible I move on to consider whether the evidence is admissible after engaging in the Stage II analysis.

Stage II analysis – Why the proposed evidence is admissible

[16] JM was cross-examined on his affidavit by counsel for the Crown and the complainant KB.

[17] Based upon his affidavit and his testimony I will briefly summarize the most salient evidence he gave. I find he was credible during the presentation of his evidence.

[18] JM was born in November 1997. He dropped out of school before the senior high years. For a time thereafter he worked with “Youth Live”.

[19] He agreed that his memory was not good regarding dates, and when things took place. Nevertheless, he estimated that his friendship with KB (who is the same age as JM) “goes back 3 to 4 years” which suggests it started as far back as in 2016. They were friends until early 2017 when they had a falling-out that lasted six or seven months until they re-established their relationship as friends in late 2017. Thereafter, they remained close friends until the date of the incident (August 5-6, 2018).

[20] He noted that they frequently shared a bed together, on only several occasions at his house, but very regularly at her house, where, as I understand it, she lived with her mother.

[21] He testified that for July and the first week of August 2018, he was there practically the entire time and that their regular habit was to sleep together in one bed. Evidence of this habit is only made relevant because of his claim that they did so every night during that period, and almost every night KB would wake up as a result of a recurring nightmare usually between about midnight and 1 AM.

[22] About two weeks after their initial meeting (3 to 4 years ago) he says "we got close" when they were in his room/house, and KB had such a nightmare for the first time with him present. Her nightmare woke him out of sleep, and he touched her shoulder to console or comfort her. However, as he put it: "after that I knew not to touch her". Thereafter, he concluded it was better "just [to] talk to her". The reason being is that in response to him touching her "she freaked out and did not know who was touching her – then I sat on my floor and talked to her from there."

[23] She told him about the nightmares she experienced and that they are always the same- they were rooted in an incident that happened to her in junior high school – she had been sexually assaulted by a male individual in the area of a set of stairs, and involved her being bent over which caused one of her ribs to be broken. She cautioned him thereafter to be careful in relation to her rib area. She told him that the nightmares "seemed real" and that "it felt like it was happening again"

[24] He has since repeatedly experienced the same pattern of behaviour by KB: in the early morning, each time she is “acting jumpy and breathing heavily”. Typically, the nightmares would cause her to also flail about and wake up, either of which would wake him up.

[25] Typically, they would go to bed between 8 PM and 9 PM or slightly later, and sometime between midnight and 1 AM she would experience the nightmares. Upon waking she would tell him that she had the nightmare again, and he would try to help her by only talking to her to calm her, without physically touching her.

[26] In cross-examination, he testified that on a couple of occasions when they were together at his home, KB suggested that he had touched her, which he says he did not. She was angry and admonished him: “don’t touch me”. Thereafter, she seemed to appreciate that she had been having the nightmare and calmed down.

[27] In cross-examination he also confirmed that other than on the first occasion and on those two latter occasions, typically when she awoke from the nightmares, she:

1. quickly seemed aware of her environment;
2. she recognized him; and
3. did not accuse him of sexually touching her.

A consideration of the relevant factors and jurisprudence

[28] As I referenced in *R v Brown*, 2019 NSSC 177 ,The most relevant sections of the *Criminal Code* are as follows:

> 12 The December 13, 2018 *procedural* law amendments upon which I am relying, and which the Supreme Court of Canada did not consider in *R v Barton* (strictly speaking, though for present purposes -- when read in conjunction with the associated jurisprudence - in substance they are indistinguishable), were helpfully set out by Justice Lynch in *R v TPS*, 2019 NSSC 48 in the context of the appointment of state-funded counsel for complainants in such situations:
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> "Legislation:
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> 10 There have been recent amendments to the *Criminal Code* sections dealing with s. 276 and s. 278 applications. The relevant sections now read:
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> 276(1) Evidence of complainant's sexual activity
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> In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
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> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (b) is less worthy of belief.
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> 276(2) Conditions for admissibility
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> 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.

276(3) Factors that judge must consider

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.

276(4) Interpretation

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

Sections 276.1 to 276.5 were repealed.

278.93(1) Application for hearing -- sections 276 and 278.92

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).

278.93(2) Form and content of application

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.

278.93(3) Jury and public excluded

The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

278.93(4) Judge may decide to hold hearing

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).

278.94(1) Hearing -- jury and public excluded

The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

278.94(2) Complainant not compellable

The complainant is not a compellable witness at the hearing but may appear and make submissions.

278.94(3) Right to counsel

The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

278.94(4) Judge's determination and reasons

At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

(a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;

(b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

278.94(5) Record of reasons

The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.

11 For s. 278 applications there is a specific provision for service of the application on the complainant and others:

278.3(5) Service of application and subpoena

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.

For s. 276 applications there is no corresponding provision for service of the application on the complainant."

13 The December 13, 2018 amendments also included *substantive* matters, although as noted, they are not relevant to this trial.

14 The definition of "consent" in s. 273.1 was amended by adding the highlighted subsections (clause 19):

Meaning of consent

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.

15 The "no consent obtained" subsection (s. 273.1(2)) was amended to include the highlighted portions (clause 19):

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.

16 Section 273.2 (where belief in consent is not a defence) was amended to include the highlighted portions (clause 20):

Where belief in consent not a defence

> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from
>
> (i) the accused's self-induced intoxication,
>
> (ii) the accused's recklessness or wilful blindness, or
>
> (iii) any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
>
> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
>
> (c) there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[29] JM has the evidentiary and legal burden to satisfy the court that the section 276 (2) "conditions for admissibility" have been met.

[30] I am satisfied that the all the preliminary requirements are met. Furthermore, I am satisfied that the evidence:

1. is not being put forward for the purpose of supporting the prohibited inferences (the twin myths referenced in s 276 (1)).

2. is relevant to an issue at trial-JM disputes that he sexually touched KB – he denies committing the *actus reus* of sexual assault. The Crown must prove beyond reasonable doubt that he did so. His counsel puts it thusly: "KB's perceptions of what happened are a central issue in the

trial" – only she and JM were present. The reliability of her anticipated account of the circumstances of her waking in the early morning on August 6, 2018 to find what she believed was JM having vaginally penetrated her goes directly to the penultimate issue of whether he committed this offence or not. The existence of the proposed evidence (specifically here, the reliability of her waking identification of JM as having vaginally penetrated her) regarding the nightmares makes the non-existence of another fact in dispute (the *actus reus* for sexual assault) more probable than it would be otherwise- *R v Cloutier* [1979] 2 SCR 709 at p. 731;

3. is of specific instances of sexual activity – the nightmares occur because KB says she was previously sexually assaulted; she repeatedly *communicated* this to him (s. 276(4)- The purpose of this requirement is to ensure that the evidence does not relate to the general reputation of the complainant, and that it is specific enough to permit a meaningful response (*R. v. Quesnelle*, 2010 ONSC 2698);

4. While typically prior sexual history is not seen to be relevant where a defence of denial of the *actus reus* is made (*R v Darrach*, 2000 SCC 46 at para. 58: "will rarely be relevant"); see also para. 25 in *R v*

> *Barakat*, [2019] OJ. No. 705 (CJ)); the proposed evidence has *significant* probative value and as it appears it could be crucial to JM's defence there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case. And while the consideration of the danger of prejudice to the proper administration of justice is always a legitimate concern, in the circumstances of this case, the interests of justice favour the right of the accused to make full answer and defence over the concerns of society's interest in encouraging the reporting of sexual assault offences, the potential prejudice to the complainant's personal dignity and right of privacy, and other relevant considerations.

Conclusion

[31] The proposed evidence regarding the existence of the prior unconsented-to sexual activity (not the details thereof), and that of KB's experiencing recurring nightmares related thereto, and her state of awareness at the material times, is admissible.

[32] The court intends to carefully scrutinize questioning of KB and of JM should he testify, so as to fairly balance JM's right to full answer and defence and KB's legitimate expectation of privacy and dignity.

Rosinski, J.