

CANADA / JUDGMENT

R. v. A.R.

2024 BCSC 2644

COURT

Supreme Court of British Columbia

DECIDED

26 August 2024

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2025 BCSC 2644 R. v. A.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.R.,

2024 BCSC 2644

Date: 20240826

Docket: 31097-2

Registry: Prince Rupert

Rex

v.

A.R.

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In Camera

Before: The Honourable Justice Gibb-Carsley

Oral Reasons for Judgment

s. 276 Application - Stage One Application

Counsel for the Crown:

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Counsel for the Complainant:

N.M. Brar

Place and Date of Hearing:

Prince Rupert, B.C.

August 26, 2024

Place and Date of Judgment:

Prince Rupert, B.C.

August 26, 2024

I. Introduction

- [1] THE COURT (by videoconference): The applicant, A.R., is charged with one count of sexual assault contrary to s. 271 of the Criminal Code against the complainant that allegedly occurred on April 11, 2022, in Prince Rupert, British Columbia.
- [2] The trial of this matter is set to commence before me as a judge alone trial on September 10, 2024, for nine days in Prince Rupert.
- [3] The applicant makes an application under s. 278.93 of the Criminal Code for a ruling that sexual history evidence of the complainant and the applicant, and the complainant and another individual are "capable of being admissible" and should graduate to the second stage of the admissibility analysis.

II. Evidence sought to be adduced

- [4] The applicant has filed an affidavit which details his evidence of alleged sexual activity with the complainant outside the subject matter of the charges against him. He also alleges that the complainant had a sexual relationship with another individual, D.H., known to both the complainant and applicant.
- [5] Seeking to adduce evidence of previous sexual activity engages a legislative shield against admission of sexual evidence in s. 276 of the Criminal Code. At this first stage, pursuant to s. 278.93(4), in addition to certain procedural requirements, the question is whether the evidence tendered is "capable of being admissible".
- [6] The applicant wishes to adduce evidence of other sexual activity, specifically:
 - a) that the complainant was in a romantic relationship with D.H., a supervisor at the workplace of the complainant, the applicant and D.H.;

- b) details of previous sexual encounters between the complainant and the applicant, specifically that (i) the complainant and the applicant had consensual sex on or about March 12, 2022, March 18, 2022, and March 29, 2022; (ii) that the complainant and the applicant had penetrative sex on three occasions prior to the alleged incident, and (iii) that the complainant appeared to want to keep their sexual relationship a secret; and
 - c) in the alternative, the applicant seeks to adduce evidence that he and the complainant had a "friends with benefits" type relationship.
- [7] The applicant seeks to adduce the evidence for four purposes:
- a) the complainant's romantic relationship with D.H. is relevant to the defence theory that the complainant had a motive to fabricate the allegation against the applicant in order to protect her relationship with D.H. and remove the applicant from her workplace;
 - b) the fact that the complainant and the applicant previously had sexual intercourse is relevant to the anticipated evidence that the applicant's DNA was found in the complainant's underwear, but not on her person. Without the evidence of the prior sexual history, there is no way to explain the presence of his DNA in the underwear;
 - c) the fact that the complainant and the applicant engaged in sexual activity on several occasions prior to the alleged incident is relevant to the complainant's credibility arising from the fact that she failed to mention anything about their sexual relationship during her statement to police; and
 - d) the complainant says the applicant was flirty and jealous with her and without the context of a previous relationship with the applicant, this leaves the impression that he was predatory or motivated by animus or possession of her and therefore more likely to have committed the offences.
- [8] As I understand the reasons for seeking adducing the previous sexual history related to the DNA evidence, the applicant asserts that if the Crown is going to call DNA evidence to assist in establishing that the applicant had some form of sexual relations with the complainant, the applicant should be permitted to assert that he had previous sexual relations with the complainant. Specifically, this evidence will provide the basis of questioning the DNA experts about whether the DNA could have been transferred to the inside of the complainant's underwear at another time.
- [9] Put simply, the applicant contends that without the context of the other instances of sexual relations between the applicant and the complainant, the trier of fact would be left with only the inference that the DNA was deposited inside the underwear of the complainant on the night of the alleged offences. The applicant argues he would be deprived of making full answer and defence in respect of the DNA in limiting questions to the DNA expert.

[10] The Crown argues in respect of the DNA evidence that any alleged prior sexual contact is of marginal relevance because other witnesses put the applicant at the location of the alleged offence on the night in question. The Crown says that given it has marginal relevance, the only reason that the applicant is tendering this evidence is to advance one of the twin myths; specifically, that because the complainant and the applicant had consensual sexual relations before, it would therefore be more likely that they did the night of the offence.

[11] The applicant also argues, in respect of the alleged credibility of the complainant, that because she did not mention that she had a prior relationship with the applicant to the police, it impeaches her credibility. In the police interview, the following exchange occurred between the complainant and the officer:

Complainant: But we started drinking together, like probably a month and a half, two months ago.

Officer: Okay, and uh tell me about like the drinking you guys have done, what typically happens?

Complainant: What I, um, same like usually thing, we drink, have fun, we go home and he would usually go home right like be one of the first ones to go home.

[12] The applicant's position is that the complainant, in providing her statement to the police, was not truthful or at least not fully explanatory of the relationship she had with the applicant. As such, he should be able to cross-examine her on this statement to the police to test her credibility.

[13] The Crown argues that the police never asked the complainant directly about the previous relationship with the applicant and, as such, her credibility remains intact. Therefore, the Crown asserts that there can be no probative value of asking questions regarding the previous relationship.

[14] In respect of the applicant's submission that he should be entitled to challenge the complainant on her statement to the police that he was flirty and jealous, the applicant argues that without that information, it paints the applicant as someone who was jealous, potentially predatory, and potentially motivated by animus towards the complainant. In other words, without the context of the relationship between the applicant and the complainant, a negative inference could be drawn towards the applicant at trial by the trier of fact.

[15] In respect of the first purpose that the applicant seeks to adduce evidence of the relationship between the complainant and D.H. -- in order to challenge the complainant on whether she had a motive to fabricate evidence against the applicant -- the Crown does not oppose this aspect of the application.

[16] In regard to the applicant seeking to call the evidence of prior sexual activity to respond to the statement made by the complainant that he was flirty and jealous, the Crown argues that how the applicant acted, why he acted, or how he was perceived to have acted by the

complainant, are completely irrelevant to whether the sexual assault occurred on April 11, 2022. The Crown argues that such evidence would only go to a belief of the complainant about the applicant, and does not elevate to casting the applicant in a negative light such that it would be prejudicial to not have a chance to respond to the accusation of him being jealous and flirty, because he and the complainant, were in some sort of relationship prior to the alleged assault.

III. Legal principles

- [17] The admissibility of evidence of sexual activity outside of the charged offence is examined in a two-stage proceeding. The first stage is a screening mechanism to weed out unmeritorious sexual history applications. In addition to the procedural requirements, the judge must be satisfied that the evidence sought to be adduced is capable of being admitted at trial under s. 276(2). "Capable of being admissible" by its language and function as a first stage screening mechanism dictates a broad, not overly strict approach. In practical terms, relevance will almost inevitably be the main focus. If the first stage is met, it proceeds to the second stage. At the second stage, the judge must hold a hearing under s. 278.94 to determine whether the evidence is admissible. The complainant may participate in the hearing and be furnished with the right to counsel and the right to make submissions provided in ss. 278.94(2) and (3) of the Criminal Code.
- [18] The defence initiates these applications by filing materials to particularize the evidence it seeks to adduce and explain how it is relevant to an issue at trial. These application materials must provide the information necessary for a judge to evaluate the claim of relevance and understand its potential operation within the context of the trial: see *R. v. Comin*, 2022 BCSC 530 at para. 54.
- [19] In *R. v. Kapustinsky*, 2020 ABQB 611 [Kapustinsky], the first stage of the test was described as follows:
- [21] The first stage does not determine ultimate admissibility under 276(3). This preliminary step is meant to screen out those requests to raise other sexual activity which, on their face, are clearly brought for an impermissible purpose. At this point in the process, the Court must be satisfied that the evidence tendered with the application "is capable of being admissible under section 276(2)" [emphasis added]
- [22] Only those applications which pass this threshold are sent to a full hearing under s 278.94. Applications which lack sufficient detail risk being summarily dismissed

- [23] The guiding jurisprudence identifies two key questions the Court must ask at the first stage: (i) is the proposed evidence sufficiently well-defined and circumscribed to serve a proper purpose; and (ii) can the [applicant] articulate the mechanism of relevance to which those specific facts relate. A detailed examination of the relevance mechanism, and the overall balancing of interests the probative and prejudicial value of the evidence, are reserved for the full hearing.
- [24] The preliminary screening is designed to weed-out meritless uses of other sexual activity evidence which are simply manifestations of the increasingly well-defined archetypes of prohibited reasoning. These are meant to be eliminated summarily, without disruption to the trial process, and without needlessly traversing these sensitive matters.
- [25] The threshold for the [applicant] to overcome at the first stage is low. The Court conducts only a facial consideration of the matter, with any doubts that exist as to the admissibility of the evidence best left to the second stage voir dire
- [20] Weighing probative value and prejudicial effects as required by s. 276(2)(d) should generally await the rigorous and very specific analysis of the second stage, as opposed to being considered at stage one. As held by the Saskatchewan Court of Appeal in *R. v. Ecker* (1995), 96 C.C.C. (3d) 161 (Sask. C.A.) and the Ontario Court of Appeal in *R. v. LeBrocq*, 2011 ONCA 405, [2011] O.J. No. 2323 (Ont. C.A.) at para. 8, if there is doubt, a judge should err on the side of finding that the first stage is met. Four principles emerge from those cases in the context of a stage one inquiry:
- 1) doubts, that might exist at the first stage application, are better left to be resolved at the second or hearing stage, because 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;
 - 2) courts must be cautious when applying the limits on the rights of an applicant to cross-examine and adduce evidence;
 - 3) unless such evidence clearly appears to be incapable of being admissible, having regard for the criteria under s. 276(2) and the factors set out in s. 276(3), the judge should proceed to the evidentiary hearing stage; and
 - 4) only clearly unmeritorious applications, evidence of marginal relevance, or evidence going almost exclusively to twin-myths reasoning should be denied second-stage examination. The protection of the applicant's right to full answer and defence, which is vital to a fair trial, requires this approach.

IV. Determination of Stage ONE

- [21] I am satisfied that the procedural requirements of the first stage of the process found under s. 278.93 are met, namely:

- a) the application is in writing;
- b) the application set out detailed particulars of the evidence to be adduced and its purported relevance; and
- c) a copy of the application was given to the prosecutor and the clerk of the court seven days prior to the hearing.

- [22] As such, in this application, it is whether the evidence is "capable of being admissible" when considered under 276(2) of the Criminal Code that is the issue.
- [23] The Crown asserts that the evidence of the complainant's and applicant's previous sexual history goes directly and only to the prohibited stereotypes, primarily that if the complainant had consented to sexual activity with the applicant before, she was more likely to consent at the time of the assault. I agree that this would be a prohibited reason to admit the evidence.
- [24] However, in my view, based on the evidence before me on the stage one application, the applicant seeks to adduce evidence to make full answer and defence.
- [25] In respect of the purpose of adducing evidence of the sexual history of the applicant and the complainant in respect to the DNA evidence, in my view, it is capable of being admissible. It strikes me that the applicant should have an opportunity to counter evidence that his DNA could only have been placed inside the complainant's underwear on the night of the offence.
- [26] In respect of the applicant's reason for the sexual history to explain why he might be jealous and flirty, while I find this may be a marginal basis to explain the complainant's views of his actions, at the threshold level, I view the matter should proceed to stage two: see Kapustinsky at para. 47.
- [27] In respect of the complainant's "omission" to police regarding her sexual relationship with the applicant, again, I find this on the margins of touching on her credibility. There is merit to the Crown's submission that there is nothing that touches on her credibility in not answering a question that was not directly asked of her during a police interview. That said, as guided by the jurisprudence, if I am in doubt as to whether the evidence is capable of being admissible, I should allow the matter to proceed to stage two to hear further argument, also with the benefit of the complainant's counsel's participation.
- [28] Again, to reiterate, the first stage analysis is not onerous and is meant to ensure that only clearly unmeritorious applications of marginal relevance or that engage almost exclusively twin-myths reasoning should be denied second-stage examination.

[29] It may be that ultimately, as urged by the Crown at the stage one submissions, I will determine that the evidence sought to be adduced will tip the balance into being prohibited evidence. However, given the foregoing, I am satisfied that the application for the applicant to adduce the previous sexual activity between the complainant and the applicant and the complainant and D.H. may proceed to the second stage.

[30] These conclude my reasons for judgment for the stage one application.

"Gibb-Carsley J."

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