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R. v. Edgar

2020 BCSC 381

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 381 R. v. Edgar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Edgar,

2020 BCSC 381

Date: 20200316

Docket: 28703-1

Registry: Vancouver

Regina

v.

John Charles Edgar

Restriction on Publication: Pursuant to section 278.94 of the Criminal Code

Before: The Honourable Justice Schultes

Ruling on Section 276 Criminal Code Application

Counsel for the Crown:

M. Merry

Counsel for the Accused:

K. Cronin, Q.C.

Counsel for the Complainant:

C. Elden

Place and Date of Hearing:

Vancouver, B.C.

February 18, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 16, 2020

Introduction

- [1] Mr. Edgar is charged with sexually assaulting the complainant M.T. in Bella Coola on July 15, 2018. He is applying pursuant to s. 276 of the Criminal Code to lead evidence of Ms. T's prior sexual conduct in his forthcoming trial.
- [2] Because of the timing of the application in relation to the start of the trial, I provided the result with reasons to follow. These are the reasons.
- [3] The proposed evidence of prior sexual conduct takes two forms:
- Reports from the RCMP's National Forensic Laboratory Services identifying Ms. T's husband's DNA profile on items that were obtained from her during a sexual assault examination that was carried out after the alleged offence (the reports also show that Mr. Edgar's DNA was not found); and
 - Questioning Ms. T. about her consensual sexual intercourse with her husband during the period immediately preceding the alleged offence, including whether he ejaculated during it and used a condom.
- [4] Crown counsel and Ms. T's counsel oppose the admission of the DNA evidence. They concede that questions to her husband about their previous intercourse are admissible on the issue of the vaginal injuries that she suffered during that time period (which the Crown is itself relying on to support her evidence), but they submit that the questions about ejaculation and condom use are inadmissible, for the same reasons as the DNA evidence.
- [5] Crown counsel also submits that the form in which the permissible questions about sexual activity with the husband are asked should be modified, to minimize the intrusion into the complainant's privacy.
- [6] If the DNA reports are admitted, the Crown seeks to lead additional evidence about the circumstances in which DNA may not be detected despite sexual intercourse having occurred, in order to prevent any inaccurate inferences being drawn from the absence of Mr. Edgar's DNA.

- [7] As we know, s. 276 makes evidence of sexual activity by the complainant that is not the subject matter of the charge inadmissible for the purposes of supporting the inference that the complainant is more likely to have consented to the activity in question, or is less worthy of belief (ss. (1)). These improper uses are often described as the "twin myths".
- [8] Evidence of specific instances of sexual activity may be admitted if it is relevant to an issue at trial and "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (ss. (2)).
- [9] In deciding whether to admit the evidence under ss. (2), the court must take into account the factors listed in ss. (3), which include the accused's right to make full answer and defence, the likelihood that the evidence will lead to a just determination of the case, the risk of unduly arousing prejudicial sentiments in the jury, and potential prejudice to the complainant's personal dignity and right to privacy.
- [10] The preliminary submissions by Mr. Edgar's counsel met the threshold established by s. 278.93 for holding a hearing on this issue, which is that the evidence sought to be elicited is "capable of being admitted" pursuant to s. 276(2).

Evidence

- [11] The offence is alleged to have been committed at Mr. Edgar's home, where Ms. T., who is his cousin, and her husband were visiting. Ms. T. is expected to testify that after her husband went to bed, Mr. Edgar took hold of her forcibly and had vaginal intercourse with her without her consent, including ejaculating while his penis was in her vagina. She said that he did not use a condom.
- [12] A doctor at the hospital in Bella Coola examined Ms. T. later that morning. The doctor found a small abrasion in the left posterior introital (entrance) area of her vagina and a slight swelling of the vaginal tissues. She was also generally sore "intervaginally". The Crown intends to lead these injuries from the doctor as confirmatory evidence of the assault that Ms. T. described.
- [13] Ms. T. told the doctor that her cousin had penetrated her vaginally, without using a condom, and ejaculated inside her. In answer to the questionnaire portion of the interview form, she said that she had had vaginal intercourse within the preceding seven days, and that a condom was not used during it.
- [14] The doctor took vaginal swabs from Ms. T., and her underwear was seized as an exhibit. These items were analyzed by the forensic laboratory, with the following results:
- DNA profiles were obtained from the vaginal swabs and the interior crotch area along the left side of the underwear. They were of mixed origin consistent with having originated from two individuals - Ms. T.'s husband and Ms. T. herself; and

· A DNA profile was obtained from the lower front center area of the underwear, towards the right edge. It was of mixed origin, consistent with having originated from at least three individuals. The male profile was of Ms. T.'s husband and the partial female profile was hers. The report explained that "due to the weakness of the components and the number of possible contributors", no meaningful comparison could be made to the remainder of the profile.

As I mentioned previously, Mr. Edgar's DNA profile was not identified in the examination of these items.

[15] The forensic specialist who prepared these DNA reports recently spoke to Crown counsel and explained some of the principles underlying the transfer of DNA, both generally and in the specific situation of sexual intercourse. The specialist's essential points are that:

- There are numerous factors that influence whether skin cells will be transferred from a penis to a vagina during intercourse. It is possible that no skin cells will be transferred during that process, or that they will not be discovered.
- In relation to the second of these possibilities, the specialist explained that skin cells are harder to discover than semen because they involve the transfer of a smaller amount of material.
- A further possibility is that DNA from skin cells is discovered, but in amounts too small to amplify (that is, turn into readable form) as part of the DNA analysis; or that it is "overwhelmed" (which I took to mean rendered undetectable) by the female DNA profile.
- The specialist's opinion is that the identified profile in this case came from semen. As in the case of the female DNA profile, it is possible that the semen overwhelmed any DNA from skin cells left by a second male.
- It is not possible to determine which of these two bodily substances is more easily washed away, but the specialist did say that semen can be retained after a woman showers or voids her bladder.
- If two males had ejaculated in equal amounts in a vagina, and both ejaculations contained healthy sperm cells, one would expect to see two male DNA profiles. However, if one male's semen did not contain sperm (due, for example, to illness or having had a vasectomy) then that male's DNA profile may not be identified.
- Sperm contains a lot of DNA, while semen itself contains much less - only from the epithelial cells that can be found in it.

[16] This information offers several possible reasons that Mr. Edgar's DNA profile would not have been identified even if, as Ms. T. has described, he had sexual intercourse with her without a condom and ejaculated.

Positions

Overview

[17] It is common ground that none of this proposed evidence engages the "twin myths" prohibited by s. 276, in that it does not invite the trier of fact to infer that Ms. T. is more likely to have consented to sexual activity with Mr. Edgar, or that she is less worthy of belief. As a result, the focus of the submissions was on the probative value of the proposed evidence, when it is considered in light of the other factors listed in s. 276.

Defence

[18] The basis for the defence seeking to enter the DNA reports is straightforward. Mr. Edgar's counsel submits that the finding of DNA belonging to Ms. T.'s husband during the sexual assault examination greatly increases the probative force of the absence of Mr. Edgar's DNA, because it shows that there was DNA in that location that was capable of being found. It is therefore highly relevant to the critical issue at trial, which is whether Mr. Edgar had sexual intercourse with Ms. T., as she alleges.

[19] To illustrate the point that s. 276 was never intended to exclude evidence that is capable of contradicting material aspects of the Crown's case, counsel provided several examples of such evidence being admitted:

- Statements describing earlier consensual sexual contact with the accused that were materially inconsistent with the complainant's court testimony: *R. v. Crosby*, [1995] 2 S.C.R. 912, including the comment at para. 11 that "[s]ection 276 cannot be interpreted so as to deprive a person of a fair defence";
- Evidence of a previous sexual encounter contradicting the complainant's testimony that before the offence date her relationship with the accused had been a platonic one: *R. v. Harris*, (1997) 118 C.C.C. (3d) 498 (Ont. C.A.);
- Evidence of previous sexual activity contradicting the inference sought by the Crown that the complainant had never engaged in such activity before the offence date and that her pregnancy resulted from intercourse with the accused during the offence: *R. v. R.V.*, 2019 SCC 41; and
- Evidence of previous sex work by the complainant, to contradict her evidence, on charges related to the accused recruiting her to engage in such work, that she had not engaged in it prior to the alleged recruitment: *R. v. Floyd*, 2019 ONSC 785.

[20] The common thread in these cases is that the sexual content of the evidence was secondary to its contradictory value in relation to the complainant's version of events.

[21] In addition to evidence from the DNA reports, the proposed questions about whether Ms. T.'s husband used a condom and ejaculated during it are intended to link Ms. T.'s description of the actual intercourse with the objective evidence of the husband's DNA as identified in the reports, which was obtained from semen.

Crown

- [22] Crown counsel began her submissions by referring to the comments of the Supreme Court of Canada in *R v. Goldfinch*, 2019 SCC 38, at para. 38, that sexual assault remains "one of the most highly gendered and underreported crimes" and that "[a]s time passes our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens." Section 276 must therefore be interpreted and applied, the decision emphasizes, with an awareness of, among other things, "[t]he harm caused by sexual assault, and society's biased reactions to that harm."
- [23] I was also asked to keep in mind that the restrictions in s. 276 are necessary because evidence of prior sexual activity is of limited relevance (hence the requirement that it have "significant" probative value in order to be admitted). The fairness of the trial is actually enhanced when misleading evidence is excluded pursuant to the section: *R. v. Darrach*, [2000] 2 S.C.R. 443, at paras. 21, 41 and 45.
- [24] Crucially in the Crown's submission, *Goldfinch* makes it clear at para. 95 that:
- [T]he accused must demonstrate that the evidence goes to a legitimate aspect of his defence and is integral to his ability to make full answer and defence. This requires that the accused be able to identify specific facts or issues relating to his defence that can be properly understood and resolved by the trier of fact only if reference is made to the sexual activity evidence in question.
- [25] Bare assertions that the evidence relates to "context, narrative or [the complainant's] credibility" will not be sufficient to meet that standard: para. 51.
- [26] As a result, when considering the relevance of the evidence for the purposes of s. 276, the focus must be on the specific defence that the accused is putting forward. In that analysis it is important to distinguish between situations in which the accused "can advance a particular theory without referring to that history", and those in which the "evidence directly implicates the accused's ability to raise a reasonable doubt". In the second situation, the evidence is "obviously fundamental to full answer and defence": para. 69.
- [27] Crown counsel notes that even when evidence is admitted pursuant to s. 276, it still must be properly managed to ensure that it remains within the scope of the section: *R.V.* at para. 45. Beneficial approaches include leading the evidence by means of an agreed statement of facts (*Goldfinch*, para. 75) or using specific, minimally-invasive wording for the questions in cross-examination (*R. v. Akumu*, 2017 BCSC 533 at para. 26).
- [28] Applying these principles to our facts, the Crown submits that in light of the additional information obtained from the forensic specialist, the DNA evidence does not meet the required standard of having significant probative value. In particular, there is no longer necessarily a contradiction between Ms. T.'s description of ejaculation occurring during the offence and the absence of Mr. Edgar's DNA. (It is also noteworthy in this regard that ejaculation is not in itself an essential element of the offence.) The evidence is also incapable of assisting whether or not penetration took place, since skin cells may or may not

be detected in that case. In fact, in light of the qualifications provided by the specialist, the DNA evidence would be misleading to the trier of fact.

- [29] When the factors in ss. (3) are considered, the Crown submits that several of them weigh against admitting the evidence. The use of the results of a sexual assault examination in this manner would tend to discourage the reporting of sexual assaults, as contemplated in (b); the reduction in the value of this evidence by the further evidence from the forensic specialist means that it is unlikely to lead to a just determination in the case (c); and leading this evidence will place further emphasize on Ms. T.'s involvement in a very invasive kind of physical examination, beyond what the Crown is required to present.
- [30] Significantly from the Crown's perspective, the blanket denial of sexual activity that appears to be Mr. Edgar's defence can be put forward without relying on the DNA evidence.
- [31] The Crown argues that the additional proposed questions about whether Ms. T.'s husband ejaculated or used a condom during their most recent intercourse really belong with the DNA evidence in this analysis. They do not relate to Ms. T.'s injuries, which are dealt with by the permissible questions on the fact of the previous intercourse and its timing. Instead, they are inextricably linked to the absence of Mr. Edgar's DNA, and inform the question of why it was not detected. As in the case of the DNA evidence, the Crown's position is that the questions do not contribute anything to Mr. Edgar's defence, which can be advanced sufficiently without them. They also engage several of the factors in s. 276(3), including their minimal relationship to his right to full answer and defence and the fairly substantial intrusion into Ms. T.'s dignity and privacy that they would cause.
- [32] Finally, the Crown submits that the permissible questions relating to the alternative causes of Ms. T.'s injuries should be modified in accordance with the authorities, to avoid any unnecessary intrusiveness. Crown counsel suggested that Ms. T. could simply be asked if there was any other activity that occurred in the previous dates that could have caused the pain and injuries that she described, and if so, what it was and when it occurred.

M.T.

- [33] Like the Crown, Ms. T.'s counsel based her submissions on the recent instructions from the Supreme Court of Canada in *Goldfinch* about the care and sensitivity with which s. 276 applications must be conducted. Integral to this required approach is the role of the judge as the gatekeeper, to ensure that harmful and misleading evidence of the kind that has unfortunately been previously allowed in sexual assault cases does not make its way into the fact-finding process.
- [34] Of the considerations in s. 276(3), counsel submitted that avoiding an unnecessary intrusion into Ms. T.'s personal dignity and privacy is particularly important in this case. In addition to the details of her sexual assault examination that will already be before the court, the defence seeks to present DNA evidence and cross-examine Ms. T. on an intimate aspect of her personal life - her sexual relationship with her husband. While fairly acknowledging

that this is not as aggravated as the exploration of other kinds of sexual activity, her counsel stressed that it is still a meaningful intrusion. Compelling this information to be revealed will in turn discourage other complainants from reporting the offence against them, which is another important consideration under ss. (3).

- [35] On the actual probative value of the evidence, Ms. T's counsel relied on the observation at para. 58 of Darrach that "[e]vidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place", which appears to be the defence here. As the Crown had, counsel contended that such a bare denial can still put forward effectively by the defence without relying on this evidence.
- [36] Also as the Crown had, Ms. T's counsel stressed that the qualifications from the forensic specialist of the circumstances under which DNA may be transferred undermine the significance of the absence of Mr. Edgar's DNA, thus depriving it of its likely relevance. Given its limited probative value, there is also the concern that it will be of little assistance to the trier of fact in arriving at a just determination of the case, which is of course a further consideration under ss. (3). Even if it has some relevance, counsel submitted that in the overall weighing of the relevant factors, "the cons clearly outweigh the pros".

Discussion

- [37] I think it is important to clarify at the outset what is actually within the scope of s. 276 here. To the extent that they show that Mr. Edgar's DNA was not found in an examination of the samples taken from Ms. T's sexual assault examination, the reports deal with the event that forms the subject matter of the charge, and do not engage s. 276. They are analogous to a report from Ms. T's sexual assault examination - they describe evidence, or the absence of evidence, arising from the alleged offence. Put simply, it will always be open to the defence to elicit the fact that Mr. Edgar's DNA was not found, as a fact tending to undermine Ms. T's version of the offence.
- [38] In this regard, it does not matter that Mr. Edgar having ejaculated is not itself an essential element of the offence. She has apparently reported that he did, and contradicting that assertion is potentially an important aspect of an overall challenge to the credibility or reliability of her evidence.
- [39] The real question is the probative value of adding to the fact that Ms. T's husband's DNA, from semen, was found. In my opinion, this evidence strengthens the inferences arising from the absence of Mr. Edgar's DNA substantially. Standing alone, the absence of his DNA is subject to the open question of whether anyone's DNA could have been recovered during the examination. The results relating to her husband eliminate the possibility that the circumstances for recovery of bodily substances from the examination were unfavourable in general, and amplify the potential significance of the absent profile. They narrow the explanations for the absence of Mr. Edgar's DNA to the alternatives offered by the Crown or, critically for the defence, the alternative that Mr. Edgar did not ejaculate as she described.

- [40] The fact that the Crown will be able to present these alternative explanations for the absence of Mr. Edgar's DNA does not really diminish the potential probative force of the husband's DNA, in my opinion. These explanations offer possibilities, the likelihood and weight of which will need to be finally determined by the trier of fact. They are all deviations from the basic premise described by the forensic specialist that "[i]f two males had ejaculated in equal amounts in a vagina, and both ejaculations contained healthy sperm cells, one would expect to see two male profiles". None of them yet definitively undermines the inference that is available from the presence of the husband's DNA. To rely on them to exclude that evidence at this point would be to conflate my gatekeeper role under s. 276 with the attribution of their ultimate weight.
- [41] I agree with the Crown that the additional proposed questions engage the same considerations as the DNA reports and should be included in the same analysis. I conclude that the proposed questions on the absence of a condom and the presence of ejaculation provide an essential link between the scientific analysis of the identified bodily substances that is contained in the reports and the actual physical contact between Ms. T. and her husband that produced them. In essence, the answers to these questions complete the relevant body of evidence that is being relied on by the defence to contradict her version of events. Without them, there will be an evidentiary gap between the DNA profile of the husband and its physical origins, which may deprive the profile of its full potential weight with the trier of fact.
- [42] Because both Crown counsel and Ms. T.'s counsel emphasized it, something should also be said about the relationship between this evidence and Mr. Edgar's defence.
- [43] It is important to keep in mind that the most fundamental of all defences is to assert that the Crown has not proven its case beyond a reasonable doubt. I do not understand the defence to have yet committed itself to any additional defences beyond that. Mr. Edgar is not required to have a specific theory in addition to taking that fundamental position, which has the virtue of not requiring any defence evidence in order to have the potential to succeed.
- [44] What the passage from Goldfinch that is being relied on by the Crown means, in my opinion, is that the defence cannot simply seek to elicit evidence of prior sexual activity at large - there needs to be a demonstrated connection between the probative value of the evidence and the defence that will be advanced. It does not mean that such evidence can only be elicited when the accused is presenting a positive defence, as opposed to simply attacking the sufficiency of the Crown's proof, as in this case.
- [45] In furtherance of such an attack, evidence that is capable of undermining a critical element of how the complainant says that the offence was committed, in this case that the accused ejaculated, could be vital to undermining the credibility and reliability of that account, and may in itself raise a reasonable doubt.

[46] To address a further point made by both Crown counsel and Ms. T.'s counsel on this issue, I am unable to identify any alternative means of pursuing this legitimate defence approach without leading the evidence itself.

[47] Turning to the factors that must inform the analysis under ss. (3), I note that:

- This evidence goes to the heart of Mr. Edgar's ability to raise a reasonable doubt and thus fully engages his right to full answer and defence;
- While it certainly intrudes on Ms. T.'s privacy, as I will discuss further, when viewed in light of the totality of the evidence that will be led in the trial concerning her personal activities, I cannot identify any specific features of this evidence that would be likely to deter others from reporting sexual offence against them;
- In its critical relationship to the assessment of Ms. T.'s version of events, the evidence is likely to greatly assist the trier of fact in arriving at a just determination;
- I cannot identify any discriminatory belief or bias that would be encouraged by receiving the evidence - as in the example cases relied on by the defence, it simply offers a potential contradiction of an important aspect of the complainant's evidence;
- It is highly unlikely that learning that Ms. T. had sexual intercourse with her husband would prejudice the trier of fact against her or arouse feelings of hostility (or sympathy, for that matter). It is commonplace, socially-approved behaviour;
- Despite my conclusion on the last factor, it is obvious that all sexual activity, including within a spousal relationship, is inherently intimate and personal, and Ms. T. may well recoil from having to discuss her private life in this manner. I greatly sympathise with such a reaction on her part. Balancing this out somewhat, the evidence is focused on one specific incident in her marital sexual history, and she will be required to provide only skeletal features of it; and
- I cannot identify any tendency in the proposed evidence to put at risk Ms. T.'s personal security or deprive her of the full protection and benefit of the law.

[48] Taking these factors into account, I am satisfied that the conditions for admissibility of the evidence under s. 276(2) have been satisfied. In particular, I am satisfied, in light of the considerations in ss. (3) that "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

[49] I would not make any modifications to the questions that are proposed by the defence. For the reasons already given, I conclude that they are minimally intrusive in light of the significant relevance of their subject matter. I do not think that asking them in an open-ended manner, as the Crown suggests, rather than in a leading manner as proposed, will protect Ms. T.'s dignity and privacy any further.

[50] Finally, as the defence readily conceded, the admissibility of this evidence entitles the Crown to lead the evidence from the forensic specialist about the alternative explanations for the absence of Mr. Edgar's DNA. R. v. Barton, 2019 SCC 33 at para. 80 clarified that the Crown should follow the procedure recommended in R. v Seaboyer, [1991] 2 S.C.R. 577 at pp. 633-636, to address any evidence of the complainant's prior sexual activity that it intends to lead. It seems clear that all of the considerations that weighed in favour of admitting the evidence sought by the defence apply with equal force to the Crown's proposed clarifications and qualifications of the inferences potentially arising from it.

[51] I am grateful for the helpful submissions on this application.

"Schultes J."

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