
CANADA / JUDGMENT

R. v. J.S.S.

2014 BCSC 804

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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R. v. J.S.S.,

2014 BCSC 804

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v.

J.S.S.

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Pursuant to the inherent jurisdiction of the Court, this ruling shall not be published or broadcast until the jury has rendered its verdict

Before: The Honourable Mr. Justice Schultes

Ruling on Section 267 Application

Counsel for the Crown:

K.A. Murphy

Counsel for the Accused:

S.R. Chamberlain, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

March 3 and 4, 2014

Place and Date of Judgment:

Vancouver, B.C.

April 4, 2014

- [1] This is an application by the accused, J.S., pursuant to s. 276(2) of the Criminal Code to adduce evidence of the prior sexual activity of the complainant, his former spouse, K.H. I have previously ruled that Mr. S. has met the threshold set out in s. 276.1(4) to hold a hearing on his application.
- [2] He is charged with sexual assault and sexual assault causing bodily harm, as well as two counts of assault, all against Ms. H. The overall time period for the alleged offences is between March 2011 and February 2012, when they separated.
- [3] In overview, he is alleged to have committed repeated physical assaults on her during the marriage, as well as two sexual assaults on specific dates. The physical assaults included dragging her around the house and punching her in the vaginal area. He is also alleged to have slapped her in the face on two separate incidents in January of 2012.
- [4] The sexual assaults are said to be forced anal intercourse in November 2011, and forced fellatio and anal intercourse on February 13, 2012. The February sexual assault was preceded by him grabbing Ms. H. by the neck and throwing her on the bed.
- [5] Ms. H. did not testify at the preliminary inquiry. Instead, her previous statements, and a report from one of the investigators containing her answers to some follow-up questions, were admitted pursuant to s. 540(7) of the Code.
- [6] In addition to Ms. H.'s evidence, the Crown will rely at trial on the evidence of her sister, Ms. B., who overheard conversations and received a statement from Mr. S. that could be considered confirmatory of a major argument between him and Ms. H. on February 13. Ms. B. also made observations of her sister walking as though in pain after the time that the second sexual assault is alleged to have occurred, and received disclosures from Ms. H. about forced anal intercourse that, while not initially admissible, could potentially be used to rebut an allegation of recent fabrication of Ms. H.'s evidence.
- [7] In addition, Dr. Young examined Ms. H. on February 15, 2012 and found evidence of forced anal penetration within the previous week, which the doctor thought was unlikely to have been the result of consensual activity.

- [8] Mr. S.'s jury trial on these charges is set for June of this year. The defence to the sexual assault counts will be that Ms. H. consented to the acts involved. His counsel confirmed during argument on this application that a defence of honest but mistaken belief in consent will not be advanced. A central issue in the trial therefore will be Ms. H.'s credibility on the question of whether or not she consented to the acts of anal intercourse.
- [9] The evidence of prior sexual activity that Mr. S. seeks to adduce is set out in an appropriate level of detail in his application and supporting affidavit. For the purposes of these reasons, I can summarize it sufficiently as:
- He and Ms. H. engaged in sexual activity initiated by her on their first date, and then had a vigorous sexual relationship in the following months that included fellatio, cunnilingus, and vaginal intercourse, in Mr. S.'s vehicle and in other locations, including public or easily-discoverable places.
 - Ms. H. supplied and utilized sex toys. She encouraged Mr. S. to ejaculate on different parts of her body, and suggested that they have vaginal intercourse during her menstrual period.
 - Mr. S. photographed and video recorded her, both nude and engaging in sexual activity with him in a hotel room in Vancouver in December of 2010, before his company Christmas party. He also photographed her in sexually provocative poses in February and March of 2011, and video recorded their sexual contact on two separate occasions in March and April of the same year.
 - Ms. H. sent him numerous provocative text or BlackBerry messages indicating that she was aroused by aggressive sexual actions by him towards her, as well as by anal intercourse between them.
 - Perhaps most importantly for the purposes of this application, the couple had a previous history of consensual anal intercourse, which took place four or five times between April of 2011 and February 13, 2012, the alleged date of the final offence.
 - Two or three of these acts occurred during Ms. H.'s menstrual period, which she is alleged to have enjoyed because of the additional lubrication for the activity that her menstruation provided.
 - Three of them occurred while she also used sex toys to stimulate herself, following which he washed his penis at her direction and then ejaculated in her vagina.
 - He says that he ejaculated in her anus on February 13, 2012, during consensual sex that was intended to reconcile them following an argument they had had the previous day.
- [10] Mr. S. was cross-examined on his affidavit by Crown counsel. Much of the cross-examination dealt with the credibility of his descriptions of the past consensual anal intercourse, as well as putting to him what I infer will be the theory of the Crown at trial. In the course of doing that Crown counsel made suggestions about his dominating attitude towards Ms. H., and his curiosity and titillation concerning her greater level of previous sexual experience.

- [11] These are worthwhile matters to explore at trial, but I cannot say that his evidence of alleged past sexual activity with Ms. H. was so diminished by the cross-examination that it can have no probative value if it is otherwise admissible.
- [12] However I did find useful, when assessing the probative value of her sexually provocative statements, to have it clarified in cross-examination that they were made in electronic form, and did not represent contemporaneous invitations to engage in specific activities while they were in each other's presence.
- [13] The defence argues that the evidence of Ms. H.'s prior sexual activity provides crucial context within which the trier of fact will assess Mr. S.'s evidence that the acts underlying the alleged sexual offences were consensual. The defence theory, which will be buttressed by a number of electronic messages and recorded conversations in which Ms. H. expresses her contempt and hostility towards Mr. S., is that she is a vindictive and manipulative person who has fabricated these allegations because the relationship was not proceeding as she wished. Without understanding what counsel describes as the "salacious" nature of that previous sexual relationship and the way in which it developed over time, the jury will not grasp that activities between the spouses that might initially be perceived as outside the mainstream were in fact a regular part of their relationship, and will fail to assess Mr. S.'s denials accurately.
- [14] The defence cites several cases in which it was necessary to admit the details of the prior sexual relationship between the accused and complainant in order for the trier of fact to have an appropriate context within which to assess their respective degrees of credibility.
- [15] In *R. v. Harris* (1997), 118 C.C.C. (3d) 498 (Ont. C.A.), the trial judge was found to have erred by preventing the defence from questioning the complainant on a previous sexual encounter with the accused, after she had testified that their relationship had previously been platonic. Relying on the decision of the Supreme Court of Canada in *R. v. Crosby*, [1995] 2 S.C.R. 912, in which the Court emphasized that s. 276 is not meant to preclude cross-examination on inconsistencies in the complainant's evidence even if that incidentally revealed past sexual activity, the Court of Appeal held, beginning at para. 47:

47 Not unlike the situation in *Crosby*, credibility was the central and indeed only issue in the case at hand. In assessing the conduct of the complainant and appellant on the March 4th weekend and the believability of their respective positions, the jurors may well have been influenced by their perception of the nature and extent of the existing relationship between them. Among other things, the jury had to weigh and consider why the complainant agreed to stay overnight in Pettawawa; why she did not insist on separate motel rooms; why she was shocked when the appellant broached the subject of sex at the motel room; why, if she was shocked, did she go to bed wearing only her panties; why she did not insist that either she or the appellant sleep on the pullout couch; why the appellant brought a condom with him and why he felt the need to use it.

48 By eliminating the evidence of the Tuesday night incident, the jury was led to believe that the relationship between the parties had been platonic prior to March 5th. That perception was potentially misleading and may well have caused the jury to assess the complainant's conduct in a benign fashion, viewing it as somewhat foolish or perhaps even reckless but nothing more than that. On the other hand, had the jurors been made aware of the couple's intimate sexual behaviour several days earlier, as the appellant claimed, they might well have assessed the complainant's conduct and her overall credibility in a very different light.

49 By failing to permit the appellant to lead evidence of the Tuesday night incident [which I will advise parenthetically is the prior sexual conduct in that case], the jury was deprived of the tools needed to fully and fairly assess the conduct of the parties and the believability of their respective positions. Left unchallenged, the complainant's testimony concerning her relationship with the appellant was potentially devastating to his position. If accepted, it would be a short step for the jury to conclude that the complainant did not consent to the sexual activity at the motel. To interpret s. 276 of the Code in a manner that would foreclose the appellant from attempting to rebut this crucial evidence would be to deprive him of his right to make full answer and defence.

50 Accordingly, I am satisfied that once the complainant testified in-chief, the proposed evidence became relevant and highly probative of the issue of credibility. The probative value of the evidence did not depend upon resort to the now debunked myths suggesting some connection between prior sexual activity and a lack of veracity but in its ability to contradict specific evidence given by the complainant that was central to her version of the relevant events. A sharp warning from the trial judge that the evidence of the Tuesday night incident could only be used to assess the complainant's credibility in relation to the specific events forming the subject matter of the charge and not to draw the general inferences that she was more likely to have consented or that she was less worthy of belief would have overcome any possible prejudice resulting from its admission.

[16] There was a similar outcome in the trial decision of *R. v. M.M.* (1999), 29 C.R. (5th) 85 (Ont. S.C.J.). There the judge admitted the accused's evidence that he and the complainant had had a consensual sexual relationship prior to the incident, in which he was alleged to have had forcible intercourse with her, because without that context the trier of fact could not properly assess the credibility of his account:

26. Here, if I accede to the Crown's submissions and exclude all the testimony as to prior sexual activity, then the conversations which Mr. M.(M) says he and the complainant had at the club - all the sexual talk about how much the complainant missed his body and the like, and all the testimony about their affectionate gestures - will appear utterly improbable.
27. In the censored context of what would remain of the relationship, the words and gestures which M.(M.) attributes to the complainant would spring as if from nowhere. As Mr. Bayliss [who was the defence counsel] persuasively argued, to censor the sexual character of the history of the relationship would make the defence untenable and would prevent the accused from making full answer and defence.

...

30. If I exclude the proposed testimony, then I, as trier of fact, will be asked to believe that the conversation and warm gestures, the suggestion of a threesome and ultimately the allegedly consensual acts, arose on the sudden without any contextual basis between two persons who were virtual strangers.
31. Defence is not asking me to infer that the complainant, by virtue of her prior sexual relationship with M.(M.), is the sort of person who would consent and thus likely did. Defence is merely asking me to view alleged events in context and not with portions of events censored as if contained in a letter from a war zone. No one has even remotely suggested that the complainant is less worthy of belief because of the alleged prior sexual activity.
- [17] Perhaps an even closer resemblance to the current circumstances is found in *R. v. B.B.*, [2009] O.J. No. 862 (S.C.J.). One of the reasons that the evidence of prior consensual acts of bondage during the accused's sexual relationship with the complainant was allowed was to assist the jury in properly assessing his claim that she had consented to it as part of the acts that were alleged to constitute the offence:
21. More significantly, I am concerned that the jury could not properly understand the defence of consent to aspects of the sexual activity involving bondage, as testified to by Mr. B., without knowing if the complainant previously consented to this type of sexual activity in the context of their relationship in the months leading up to the alleged assault. Without hearing evidence about whether or not bondage was part of the prior consensual sexual activity between Mr. B. and Ms. E. B., the jury might presume that the defence of consent to sexual activity involving bondage is improbable as bondage might not be considered by the jury to be a usual or ordinary aspect of sexual intercourse in the context of a married couple. Without understanding the nature of the prior relationship, aspects of Mr. B.'s account might be considered untenable in the eyes of the jury.
- [18] In *R. v. Temertzoglou* (2002), 11 C.R. (6th) 179 (Ont. S.C.J.), Justice Fuerst (at para. 17) admitted evidence of previous sexual activity, among other reasons, to "show the development of a relationship between the parties that is more than platonic, notwithstanding an age difference that might otherwise engender a presumption against the defence" -- that is, that the activity that is alleged to constitute the offence was consensual.
- [19] Finally, the decision of *R. v. Strickland* (2007), 45 C.R. (6th) 183 (Ont. S.C.J.), offers perhaps the broadest statement of this type of reasoning:
46. ... I conclude that the evidence of an existing sexual relationship between the parties in this case is a significant and essential contextual fact, without which the trier of fact cannot fully and fairly assess the behaviour of the parties on the night in question, the testimony of the complainant that she did not consent, and the testimony of the accused that she did. To prevent the accused from putting evidence of this existing relationship before the court is to

run the risk of distorting the fact-finding process and artificially rendering his evidence inherently improbable. This would, in my view, deprive him of the right to make full answer and defence.

- [20] The Crown submits that the proffered evidence is unable to advance the defence without requiring the very reasoning processes that are prohibited by the legislation -- that the complainant is more likely to have consented on this occasion because of the prior sexual activity, or that she is less worthy of belief because of it. It amounts to no more than evidence that Ms. H. is loose sexually, unlinked to a relevant issue and probative of nothing.
- [21] It is questionable, in the Crown's submission, whether such evidence is admissible in any event when the sole defence is consent, as opposed to honest but mistaken belief in consent, because lack of consent is an element of the actus reus and is proven by reference to the complainant's own subjective state of mind.
- [22] Here the Crown relies on *R. v. Dickson* (1993), 81 C.C.C. (3d) 224 (Y.C.A.) at paras. 36 and 37, aff'd [1994] 1 S.C.R. 153. Dickson was cited as support for a comment by the Supreme Court of Canada in *R. v. Darrach*, [2000] 2 S.C.R. 443, that such evidence will rarely be relevant in a case of consent.
- [23] Crown counsel points out that this evidence, far from assisting the jury in coming to a just result, will actually badly distort the fact-finding process by humiliating the complainant and prejudicing the jurors against her, based on entirely irrelevant considerations.
- [24] The provisions of s. 276 are well known, but it is still helpful to set them out to provide a framework for further discussion. Section 276 provides:

Evidence of complainant's sexual activity

- (1) In proceedings in respect of an offence under [one of the enumerated sections, which include the present ones], evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
- (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
- (b) is less worthy of belief.

Idem

- (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall 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 276.1 and 276.2, that the evidence
- (a) is of specific instances of sexual activity;
 - (b) is relevant to an issue at trial; and
 - (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Factors that judge must consider

- (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
- (a) the interests of justice, including the right of the accused to make a full answer and defence;
 - (b) society's interest in encouraging the reporting of sexual assault offences;
 - (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
 - (d) the need to remove from the fact-finding process any discriminatory belief or bias;
 - (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
 - (f) the potential prejudice to the complainant's personal dignity and right of privacy;
 - (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
 - (h) any other factor that the judge, provincial court judge or justice considers relevant.

[25] I think I should begin by dealing with the Crown's position that evidence of this nature is prohibited when the defence is that the complainant consented.

[26] In Darrach, Justice Gonthier cited the Dickson decision for the proposition that evidence of prior sexual activity must be connected to the defence that the accused advances at trial. He went on to say that it will "rarely" be relevant to the defence of consent, but did not preclude its admissibility, as the Yukon Court of Appeal had at least impliedly done in Dickson.

[27] Such a narrow window of relevance makes sense because, in the normal course, evidence of what a complainant has done on a previous occasion tells the trier of fact little or nothing useful about the credibility of her claim that she did not subjectively wish to engage in the activity that is the subject matter of the charge. Exceptionally however, such evidence may assist the trier of fact to assess the credibility of her claim that she subjectively did not wish to engage in the activity, and/or of the accused's descriptions of actions by her that are inconsistent with her professed state of mind.

[28] Justice Fuerst put it helpfully in *Temertzoglou*:

19. In *R. v. Ewanchuk* (1991), 131 C.C.C. (3d) 481, the Supreme Court of Canada considered the elements of the offence of sexual assault, and in particular the meaning of "consent". The absence of consent is an element of the offence that the Crown must prove beyond a reasonable doubt. In the majority opinion, Major J. emphasized that the absence of consent is purely subjective, and is to be determined by the complainant's actual state of mind at the time the touching occurred. The complainant's testimony will be the only source of direct evidence as to her state of mind. However, as Major J. pointed out, the credibility of that testimony still must be assessed by the trier of fact, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she did not consent. As Major J. stated at paragraph 61, "Once the complainant has asserted that she did not consent, the question is then one of credibility. In making this assessment, the trier of fact must take into account the totality of the evidence, including any ambiguous or contradictory conduct by the complainant". If there is a reasonable doubt as to consent, and it is not a . . . consent motivated by fear, fraud, or the exercise of authority, the *actus reus* of sexual assault is not established.

...

25. In *R. v. Darrach*, [2002] 2 S.C.R. 443, the Supreme Court of Canada held that s. 276 does not function as a blanket exclusion of evidence of other sexual activity, but prohibits the admission of such evidence solely to support the inference that a complainant is more likely to have consented, or is less worthy of belief, by virtue of that other sexual activity. The exclusion of evidence is limited under ss. 276(1) to that used to invoke the twin myths, and under ss. 276(2)(c), to relevant information that is more prejudicial to the administration of justice than it is probative . . .

...

29. . . . as the Supreme Court of Canada pointed out in *R. v. Ewanchuk*, once the complainant asserts that she did not consent, it will be open to the defence to raise a reasonable doubt about that element of the offence, by adducing relevant evidence. In that sense, consent and Ms. M.C.'s credibility will be issues at the trial. I am satisfied that the evidence of other sexual activity is relevant to those issues, in particular ways that do not involve twin myth reasoning. The inferences to be drawn from the evidence are not the general inferences that

solely by reason of the other sexual activity, Ms. M.C. is more likely to have consented on November 24, or should not be believed. Specifically, the evidence of other sexual activity has relevance in that it shows the development of a relationship between the parties which is more than platonic, notwithstanding an age difference that might otherwise engender a presumption against the defence; it provides necessary context to the motel visit on November 24, without which aspects of Mr. Temertzoglou's account . . . would be untenable; it is necessary in order to make sense of prior inconsistent statements that will be put to Ms. M.C., which can impact on her credibility; and it demonstrates the complainant's involvement in planning the evening of November 24, which tends to support the defence position.

- [29] Accordingly I am satisfied that, if it is otherwise admissible, the evidence sought to be adduced here is not precluded solely because the defence is one of consent.
- [30] That said, my conclusion is that a great deal of the proffered evidence is not relevant to the trier of fact's assessment of the credibility of Ms. H.'s claim that she did not consent to the acts of anal intercourse, or Mr. S.'s evidence that she acted in a manner that is inconsistent with her claim.
- [31] The fact that the parties may have had a robust sexual relationship from the earliest stages, in which Ms. H. was an enthusiastic participant and which encompassed a wide variety of sexual acts, aids, and locations, and that she was willing to be photographed or video recorded engaging in some of them, is not relevant to any of the issues that the jury will have to grapple with, outside of the discredited myths that a woman who enjoys sex must therefore have consented on these occasions, or is inherently less believable because of her supposedly loose morals. Nor do her provocative texts say anything meaningful about her decision to consent or not to anal intercourse on these two specific occasions, except by the very reasoning that s. 276 prohibits.
- [32] Besides adding nothing relevant to the legitimate fact-finding process, I agree with the Crown that this kind of evidence would also be incendiary in the hands of the jury, distracting them from their proper task by inciting in them prurient interest or moral condemnation, or perhaps both in alternating stages.
- [33] I am also unable to grasp a connection that has been argued by the defence between the sexual history and Ms. H.'s alleged vindictiveness and motive to fabricate the offences. The evidence of her hostility towards Mr. S. after the relationship is relevant and admissible on its own, quite aside from the contents of this application, and the jury may quite properly take it into account when assessing the credibility of her described lack of consent. It would not assist them in that assessment to know about the nature and extent of the sexual relationship between the couple before they had their falling out.
- [34] I would not permit any of this evidence to be elicited.

- [35] What is much less straightforward is the relevance and probative value of Mr. S.'s evidence of previous acts of consensual anal intercourse between them. The question here is whether preventing Mr. S. from leading evidence that they had previously engaged in this kind of activity four or five times creates a factual vacuum that would be unfair to him, in light of the considerations set out in s. 276.
- [36] As in the cases that Mr. S.'s counsel has relied on, much depends here on the anticipated evidence of the complainant. The absence of any preliminary inquiry testimony from her makes it more difficult to predict whether she will describe the acts of anal intercourse in a way that gives rise to any of the concerns articulated in the cases, such as that it is inconsistent with her previous statements, that it makes the defence seem untenable, or that the jury will see the acts as aberrant and therefore something that the complainant is unlikely to have consented to.
- [37] In her past statements, Ms. H. consistently describes the two acts of anal intercourse being inflicted on her forcefully, despite her protestations about the pain that he was causing her.
- [38] The main concern that arises as a result is with the nature of this particular type of sexual activity and its effect on Mr. S.'s ability plausibly to suggest in cross-examination, or to describe in his own evidence, that Ms. H. acted in a manner that is inconsistent with her professed lack of consent to it.
- [39] Without attempting the impossible task of defining the sexual mores of a jury, it seems obvious that anal intercourse between heterosexual couples, while not necessarily outside of the mainstream, is sufficiently close to its boundaries that some jurors might see it as an act that a woman would not necessarily willingly engage in -- analogous to the practice of bondage in the B.B. decision or to the sexual relationship between partners of different ages in Temertzoglou. This would artificially buttress Ms. H.'s descriptions of the incidents as violent and non-consensual, which is a burden that should properly be borne solely by the credibility of those descriptions.
- [40] In addition, the two incidents described by her would emerge as if from nowhere and, without the context of Mr. S.'s position that this was a positive consensual activity between them in the past, I can see jurors assessing his credibility more harshly and/or hers more favourably than might really be justified by their actual evidence.
- [41] I would contrast to the situation in which a spouse is alleged to have engaged in forced vaginal intercourse without the partner's consent, in which a jury would be unlikely to presume anything particular about the likelihood of consent in that specific situation, leaving them free to focus on the actual evidence before them on the issue.

- [42] Care must obviously be taken that this alleged prior conduct does not become an indirect way for the defence to argue that Ms. H. is more likely to have consented to these acts. However I am satisfied that a clear warning to the jury that the evidence is being led solely to assist them in their assessment of the credibility of the accused and complainant on the issue of consent will be effective, in conjunction with their general instructions on consent.
- [43] Accordingly, Mr. S.'s counsel will be permitted to ask questions of Ms. H. and to lead evidence that refer to the prior acts of consensual anal intercourse between the couple that are described in paragraphs 28, 31, and 32 of the notice of application, the contents of which he adopted in his affidavit.
- [44] The exceptions to this permission will be:
- First, the references to anal intercourse during menstruation in the second sentence of paragraph 28 may not be raised. They serve none of the valid purposes that I have outlined, and may instead arouse feelings of disgust in the jurors, which they may unfairly apply to their assessment of Ms. H.'s credibility.
 - Second, the reference to the use of sex toys by the complainant during anal intercourse described in the first sentence of paragraph 31 is similarly unnecessary and inflammatory and may not be referred to.
- [45] It seems to me the remaining sentences in that paragraph, which describe the manner in which anal intercourse was performed on three occasions, including references to consensual sexual activities that preceded it and Ms. H.'s application of lubrication to herself, her self-stimulation, and subsequent directions to Mr. S. to wash his penis, are a necessary part of the context of the sexual activity and they may be referred to.
- [46] Although the defence did not specifically refer to it on this point, I have considered whether the photo referred to in paragraph 24 of Ms. H. with semen "between her posterior" [sic], is relevant to the issue of anal intercourse. I have concluded that since it is ambiguously described, predates the time period during which Mr. S. deposes that anal intercourse was taking place and is very inflammatory, I will not allow it to be referred to.
- [47] Finally, I have also considered whether the electronic communications between Mr. S. and Ms. H. involving anal intercourse, described in paragraphs 17, 22, and 25 of the notice, are a necessary part of the context that I have described. It seems to me that the communications in paragraphs 17 and 22, which took place before Mr. S. alleges the anal intercourse had begun, are too remote from the actual occurrence of this type of sexual contact to have any probative value.

- [48] However, the communication in paragraph 25 was sent in the same month that this activity between them is said to have started and involves Mr. S. asking Ms. H. if he can engage in it with her, so it has real probative value in establishing the necessary context, one that outweighs its prejudicial effect. However, the references to "finishing in her mouth" are extraneous to its probative value and quite inflammatory, so they must be omitted.
- [49] If the evidence changes during the trial from what is currently anticipated, Mr. S. is of course free to make a further application.

The Honourable Mr. Justice T.A. Schultes

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