

CANADA / JUDGMENT

R. v. Ravelo-Corvo

2019 BCSC 2364

COURT

Supreme Court of British Columbia

DECIDED

18 October 2019

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2019 BCSC 2364 R. v. Ravelo-Corvo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ravelo-Corvo,

2019 BCSC 2364

Date: 20191018

Docket: 27730

Registry: Vancouver

Regina

v.

Renert Alexander Ravelo-Corvo

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. Some names have been replaced with initials to comply with this ban. Pursuant to s. 278.95(1), the court ordered that this decision can be published.

Corrected judgment: The text of the judgment was corrected on the front page where changes were made on August 12, 2021.

Before: The Honourable Madam Justice Sharma

In Camera

Oral Ruling on an Application pursuant to s. 278.93(1) of the Criminal Code

Counsel for the Accused:

D. Turko, QC

S. Dawson

Counsel for the Crown:

A. Ip

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 18, 2019

Place and Date of Judgment:

Vancouver, B.C.

October 18, 2019

- [1] The accused has brought an application pursuant to s. 276 to adduce evidence of prior sexual activity between the complainant and himself. He has sworn an affidavit that describes the evidence he wants to adduce at trial.
- [2] Crown counsel submit the affidavit does not meet the threshold required, and therefore, there is no need to proceed with a voir dire regarding the evidence's admissibility. On that basis, Crown asked for the hearing of the application to be bifurcated such that I rule on the threshold issue first. Crown counsel stated that if I decide the threshold has been met, he will seek to cross-examine the accused. Not bifurcating the hearing would put him in the position of seeking to cross-examine the accused even though if I agreed with Crown on the threshold issue that would be unnecessary. Quite properly, he wanted to avoid that situation.
- [3] On that basis counsel for the accused did not object to the hearing being bifurcated.

The Legislative Provisions

- [4] Section 276 of the Criminal Code is relevant:

276 (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, 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

- (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.

- (2) 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.
- (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.
- (4) For the purpose of this section, sexual activity includes any communication made for a sexual purpose or whose content is of a sexual nature.
- [5] The focus is on s. 278.93, which is part of the recent legislative amendments. Section 278.93(1) confirms that the accused can make an application to the judge to determine if evidence *prima facie* prohibited by 276(2) can be admitted:
- (2) 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.

- [6] Section 278.93(3) requires that the application be heard in the absence of both the jury and the public.
- [7] Section 278.93(4) states that if judge is satisfied that the application was "made in accordance with subsection (2)" and the judge is satisfied "that the evidence sought to be adduced is capable of being admissible under subsection 276(2)" the judge shall grant the application and hold a hearing pursuant to 278.94 to determine if the evidence is admissible under s. 272(2).
- [8] Section 278.94(1) is also part of the recent amendments. It confirms the voir dire to determine the admissibility of the evidence the accused seeks to adduce at trial be held in the absence of the public and the jury. Also new is s. 278.94(2) which confirms the complainant is not a compellable witness, but has the right to attend and make submissions at the voir dire.
- [9] Crown confirmed the claimant in this case was advised of her right and has chosen not to participate.
- [10] The issue before me is whether the evidence sought to be adduced "is capable of being admissible" under s. 276.
- [11] The Crown says the procedure on these applications is a two-stage process. First, the application is filed and the trial judge must determine if the requirements of s. 276.4 are met. That is the first stage. If that criteria are met, then the trial judge must hold the hearing. The purpose of that hearing is to determine, based on the factors enumerated in s. 276(2), whether the evidence should be admitted.
- [12] This ruling only relates to this first stage.
- [13] Crown submits that the accused's affidavit must set out detailed particulars of the evidence the accused seeks to adduce and the relevance of that evidence to an issue at trial. Crown submits the affidavit before me is insufficient. Crown submits the accused is required to set out what occurred in his apartment (where the alleged assault took place) and how the proposed evidence could lead to his honest, but mistaken belief in communicated consent.
- [14] The Crown relies on *R. v. Darrach*, 2000 SCC 46, and particularly paras. 53 and 56. The issue in that case was the constitutionality of s. 276. The Court considered whether the substantive aspects of 276 (those subsections that declared certain evidence inadmissible) infringed rights under s. 7 and 11(d) of the Charter.
- [15] The Court ruled they did not. In doing so, the Court also ruled on the procedural aspect of the legislation, which requires the accused to present evidence in writing (here and in many cases, by way of an affidavit) to establish the evidence for which admission is sought, and the relevance that evidence has to an issue at trial.

- [16] Starting at paras. 44, the Supreme Court of Canada addresses whether the procedural aspects comply with the Charter. It concluded that the voir dire required by s. 276 does not offend the principle against self incrimination "because the requirement that the accused establish a legitimate use for evidence of sexual activity does not compel him to testify" (para. 47). Instead, it is a strategic decision.
- [17] Starting at paras. 53 the Court addresses the specific requirement that the written evidence contained detailed particulars. At para. 59 the Court stated:
- [59] Section 276 is most often used in attempts to substantiate claims of an honest but mistaken belief in consent. To make out the defence, the accused must show that "he believed that the complainant communicated consent to engage in the sexual activity in question" (Ewanchuk, *supra*, at para. 46 (emphasis in original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. This is necessary for the trial judge to be able to assess the relevance of the evidence in accordance with the statute. It is an essential part of the legislative scheme which provides a means by which the accused may establish the relevance of the evidence he chooses to put forward.
- [18] The legislative requirement of what the evidence must show is set out in s. 278.93(4) - the evidence must "be capable of being admissible" under s. 276. The defence says the accused's affidavit supports his assertion of an honest but mistaken belief that the complainant consented to sexual intercourse.
- [19] To put the evidence in context, the allegation is that the accused sexually assaulted and unlawfully confined the complainant in his apartment after they were at the same night club with friends. He admits sexual intercourse took place, but asserts he honestly believed she consented.
- [20] I summarize the information in the affidavit.
- a. The accused met up with the complainant, whom he already knew, with a group of friends at a night club.
 - b. Earlier that evening they communicated electronically.
 - c. At the club he says they talked and danced. It is my understanding there is no suggestion this activity constituted sexual activity, the admission of which would be prohibited.
 - d. On the dance floor they danced close to one another, and "grinded" and they kissed and exchanged "mutual expressions of affection". This all took place in the night club.
 - e. He touched her body when he kissed her and she kissed him back.
 - f. Para. 6 is critical and it states:

Further, I put my hand down the front of the Complainant's pants and touched her vaginal area as I felt we were both interested in furthering sexual relations. The Complainant responded in a positive way to my touching. She made a quiet moaning sound that made me believe she was sexually aroused and interested in further sexual relations.

g. Sometime after midnight, the accused invited the complainant to go to apartment and she agreed.

[21] Crown says wording of 278.93(2) makes clear that the phrase "detailed particulars of" applies both to the evidence the accused seeks to adduce and to the relevance of the evidence to an issue at trial. Therefore, Crown asserts that the accused's affidavit must describe a link between the impugned evidence and the assertion of the defence of honest but mistaken belief in communicated consent.

[22] No case was cited to support that interpretation. However, Crown submits *R. v. Valdez*, [2009] O.J. No. 591 (Sup. Ct. Jus.) supports that proposition. However, the sexual history evidence that was sought to be introduced in that case occurred at least 6 months before the alleged offence.

[23] In *R. v. Darrach*, 2000 SCC 46, the defence called no evidence at trial. The accused had sought to introduce evidence of prior sexual history, but the trial judge disallowed the evidence. The Supreme Court of Canada specifically approved of the trial judge's implementation of a two-step process.

[24] The first step is to determine if the proposed evidence falls under the ambit of s. 276 and if so, is it capable of being admitted. At that stage in *Darrach*, the trial judge was satisfied with the affidavit of a lawyer on information and belief (see paras. 10 & 11). However, the affidavit on information and belief was insufficient to satisfy the second step of admitting the evidence.

[25] Accordingly, I do not agree with Crown's interpretation of paras. 53 and 54 of *Darrach*. The comments about the requirements of the affidavit relate not to the affidavit addressing the threshold question, but to the affidavit to support admission on the voir dire.

[26] At paragraph 55 of *Darrach*, the Court is answering the argument that requiring the accused to provide in writing the particulars of the evidence he wants to adduce violates rights under 11(c) and 11(d). It rejected the notion that this amounted to a requirement of premature disclosure by defence to the Crown because the "accused is not forced to embark upon the process under s. 276 at all". The point of s. 276's requirement of particulars is to allow the defence to raise the possibility that the complainant's prior sexual activity will be admitted so that the application is conducted on notice to the Crown of that possibility and not by ambush. Since the affidavit containing the particulars is due a week before the voir dire, the Crown then has time to consult with the complainant.

- [27] The Supreme Court ends paras. 55 by concluding that it is "borne out by the way in which the admissibility procedure operates" that no section 11(c) or 11(d) rights are infringed. That is clearly a reference to 276.1(2), not the procedure relating to bringing the application, which is 278.93 (formerly 276.2).
- [56] The defence must satisfy the trial judge that the evidence it seeks to adduce meets the statutory requirements for admissibility. To admit evidence of sexual activity at trial, the judge must provide written reasons about how the evidence "is expected to be relevant to an issue at trial" and the factors she considered in making this determination (as per ss. 276.2(3) (b) and (c)). It is perfectly appropriate that, to this end, the affidavit must disclose evidence that is "capable of being admissible under subsection 276(2)". Among other things, the evidence must be adduced for a permissible purpose and must be relevant to an issue at trial. The affidavit must therefore establish a connection between the complainant's sexual history and the accused's defence. As the trial judge put it, "there would have to be evidence to establish the link between the potential defences ... and the prior sexual conduct".
- [57] The necessity that the connection be drawn between the evidence and the accused's defence was affirmed by this Court in *R. v. Dickson*, [1994] 1 S.C.R. 153, in its adoption of the Yukon Territory Court of Appeal's judgment. In *Dickson*, the accused tendered evidence under s. 276 to support an honest but mistaken belief in consent, but then on the voir dire argued consent on one count and denied that two other counts of sexual assault had occurred ((1993), 81 C.C.C. (3d) 224 (Y.T.C.A.), at p. 233). The Yukon Territory Court of Appeal properly found that the trial judge erred in admitting the evidence of sexual activity where the evidence on the voir dire did not raise the defence of honest but mistaken belief in consent as the affidavit promised, nor did it raise any other defence.
- [28] In his submissions, Crown counsel referred to those comments about the affidavit as though they applied to the application at the threshold stage. The only issue at this first stage is whether evidence in the affidavit is sufficient to establish it is capable of being admissible.
- [29] In my respectful view, the evidence sufficient to invoke the first stage must be a lower threshold than at the voir dire. Crown suggests there must be a statement from the accused in the affidavit supporting holding the hearing (the "threshold issue") about how the evidence is linked to the activity forming the basis of the charge. It is not clear to me that is required according to Darrach. That would seem to require the accused to "testify" to even seek a hearing which seems contrary to other statements in Darrach.
- [30] In any event, I find there is a statement in the affidavit in this case that meets that threshold. At para. 6 the accused says, among other things: "I felt we were both interested in further sexual relations".
- [31] Crown argues that is not relevant to what was alleged to happen in his apartment, which forms the substance of the charge. In my view, that cannot be determined unless I hold a voir dire.

- [32] Unlike many cases both counsel referred me to, I find the temporal aspect of the proposed evidence in this case supports proceeding to a voir dire. In his application, the accused refers to allegations about the complainant's participation in sexual behaviour at the night club, their discussions and her willingness to go to the apartment for sexual activity in the period of about 30 minutes to two hours before the alleged assault. The activity the accused wants to adduce may have started as early as 11 p.m. and the assault was alleged to have happened only a few hours later.
- [33] In my view, that distinguishes this case from Valdez, and therefore supports the defence's position.
- [34] Defence counsel also submits the proposed evidence may be relevant to the complainant's credibility as to the reason they went to the accused's apartment, but not about whether she should be treated any more or less credible generally about consent during the alleged assault. The accused's version is that he invited her, and she agreed.
- [35] I am told the evidence at trial may be that she only agreed because she wanted to go to the bathroom and get a glass of water, or her evidence may be she was unsure how she got to be on the sidewalk in front of his apartment. Defence counsel also submits the nature of the conversation they had while walking from the nightclub will be important to the accused's case. She argued it will speak to the complainant's motive for reporting the assault to the police.
- [36] Therefore, I agree there is a possibility that the sequence of events on the night in question may have bearing on the credibility of the accused and complainant generally, not only to the issue as to whether consent was communicated
- [37] Defence counsel further submits the proposed evidence does not go to the "twin myths" prohibited by the legislation: that prior sexual activity makes it more likely the complainant consented to the alleged activity forming the charge, or that sexual history makes her less worthy of belief generally. It is not clear to me the defence is wrong about that, which favours holding the voir dire.
- [38] For all those reasons, I am satisfied that the accused has established in his application that the proposed evidence is "capable" of being admissible and therefore the voir dire will go ahead to determine, according to the statutory conditions, whether the proposed evidence will be admitted.

PUBLICATION

- [39] Pursuant to s. 278.93(3), this application was heard in camera. Section 278.93(4) sets out the conditions that must be met before judge decides to grant the application (and proceed to a s. 276(2) voir dire). Section 278.95(1) addresses the prohibition on publication as it relates to hearings conducted pursuant to ss. 278.93 and 278.94. It states:

278.95 (1) A person shall not publish in any document, or broadcast or transmit in any way, any of the following:

- (c) the decision of a judge or justice under subsection 278.93(4), unless the judge or justice, after taking into account the complainant's right of privacy and the interests of justice, orders that the decision may be published, broadcast or transmitted;

[40] I confirm that I took into account the privacy rights of the complainant and the interests of justice in a manner consistent with the approach mandated in s. 278.95(1)(c). In particular, I was informed by Crown counsel that the complainant did not wish to be heard and did not raise an objection to publication of any decisions related to the s. 276(2) process. I also took into account the comments of counsel that there is a dearth of case law on the threshold issue, which is addressed in this ruling. In those circumstances, I decided it may be helpful to publish this ruling, and therefore it was in the interest of justice to do so.

"Sharma J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/19/23/2019BCSC2364cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-ravelo-corvo-2019-bcsc-2364>

Prepared on 26 October 2026 · Esheria