

CANADA / JUDGMENT

R. v. S.D.

2022 BCSC 2302

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2302 R. v. S.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.D.,

2022 BCSC 2302

Date: 20221116

Docket: 42399

Registry: Courtenay

Rex

v.

S.D.

Restriction on Publication: Pursuant to s. 486.4(1) of the Criminal Code, no information that could identify the complainant shall be published in any document or broadcast or transmitted in any way.

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

s. 276 application

Counsel for the Crown:

N. Grabe

Counsel for the Accused:

S. Runyon

Counsel for the Complainant:

M. West

Place and Dates of Trial:

Courtenay, B.C.

November 14-18, 2022

Place and Date of Judgment:

Courtenay, B.C.

November 16, 2022

I. INTRODUCTION

- [1] S.D. stands charged with one count of sexual assault contrary to s. 271 of the Criminal Code, RSC 1985, c. C-46. The charge is based on a single assault that occurred on the night of March 13-14, 2018.
- [2] S.D. pleads guilty to the charge of sexual assault. He accepts that the complainant could not consent to sexual activity while asleep, as she was at the time: see *R. v. J.A.*, 2011 SCC 28 at para. 66, *R. v. Barton*, 2019 SCC 33 at para. 107. He disputes, however, the alleged degree of sexual contact: while the complainant alleges that he vaginally penetrated her with his penis while she was sleeping, he claims that he only touched her breast and outer vaginal area with his hand. In this *R. v. Gardiner*, [1982] 2 SCR 368 hearing, he puts the Crown to its obligation to prove this disputed fact beyond a reasonable doubt.
- [3] It is important to emphasise that the Court has only heard S.D.'s version of events. The complainant will testify later this week, as part of the Gardiner hearing.
- [4] According to S.D., he and the complainant had been involved romantically off and on since roughly winter 2016. They dated for some four months, and then broke up; three months later the complainant advised him that she was pregnant. They then moved together into S.D.'s mother's unfinished two-room basement suite. Next, they shared an apartment in Parksville. Once the basement suite was finished, they returned and resided there together.
- [5] By March 2018, the status of their relationship was in flux. They were no longer presenting themselves as girlfriend and boyfriend. That said, they continued to raise their young child together. They continued to live together in the basement suite. They shared a bed, although the option was open for one of them to sleep separately in the second room. They continued to engage in intermittent sexual intercourse. Around the time of the alleged offence, they were discussing reconciliation, and a return to a more formal girlfriend-boyfriend status: in S.D.'s words, "we were trying."

- [6] According to S.D., they had spent the evening in question sitting on the couch, watching a movie. Her legs were on his. From time to time they kissed and cuddled. At some point she said that she was going to bed; S.D. said that he would continue watching the movie. He claims that there was no conversation one way or the other about having sex later. After the complainant went to sleep, S.D. entered the bed. In his version, he sought to initiate sex by touching her breast, and pulling her panties down slightly, and touching the exterior of her vagina.
- [7] S.D. said that in their years together, it was a common occurrence for him to test the waters for sexual activity by touching the complainant while she was sleeping. This was a mutual practice: from time to time, the complainant would also touch him sexually while he was sleeping as a way of seeking to initiate sexual activity. He said that this practice occurred several times a week.
- [8] S.D. wishes to have the Court consider the evidence of the pattern of the parties' dormant solicitation of sexual activity, set out above. Counsel agreed, and the Court agrees, that such evidence engages the *prima facie* s. 276 prohibition on evidence that "the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge". This is because of the broad introductory phrase in that section: "In proceedings in respect of an offence " indicates that the section applies not only to the portion of the trial to determine guilt or innocence, but also to the sentencing phase of a "proceeding".
- [9] Counsel all advise that this is a case of first instance, and that they have been unable to find s. 276 authorities in the context of a Gardiner hearing.
- [10] These are oral reasons, delivered on the assize, in the middle of the week reserved to hear the entire Gardiner hearing. They are also issued in the particularly individualised context of sentencing. Accordingly, they are of limited precedential value.

II. LAW

- [11] The relevant portions of the Criminal Code are as follows:

Evidence of complainant's sexual activity

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.

Conditions for admissibility

276(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.

Factors that judge must consider

276 (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.

Application for hearing -- sections 276 and 278.92

278.93 (1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Form and content of application

- (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.

Judge may decide to hold hearing

- (4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

Judge's determination and reasons

- (4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and
- (a) if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
- (b) the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and
- (c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

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

III. DECISION

- [12] Yesterday, the Court determined that S.D. had satisfied the first stage of the s. 276 inquiry: the evidence sought to be adduced "is capable of being admissible under subsection 276(2)", and it is in the interests of justice to grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2).

- [13] For this, the second stage of the enquiry, the Court will start with the preconditions under s. 276(2)(a) - (d), before expanding on the guiding factors set out in s. 276(3).
- [14] With respect to s. 276(2)(a), the evidence of the parties' pattern of initiating sexual contact is not being adduced for the purpose of supporting either of the two impermissible and stereotypical inferences set out in s. 276(1): that is, that 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.
- [15] The s. 276(1)(a) inference is not relevant at the sentencing stage: S.D. is pleading guilty, and not alleging that the complainant consented to the sexual activity that forms the charge. Nor is he advancing the evidence to undermine the credibility of the complainant under s. 276(1)(b), through the pernicious myth that unchastity and honesty are antithetical, or otherwise: see *R. v. Goldfinch*, 2019 SCC 38 at para. 45.
- [16] With respect to s. 276(2)(b), S.D.'s state of mind, and the basis for his alleged misunderstanding that prompted him to touch the complainant's breast and vagina, is of critical importance in assessing his moral culpability, and in crafting a proportionate and appropriate sentence. To paraphrase the words of his counsel, the Court must consider whether the sexual assault was an incident of predation, prompting a more severe sentence, or the result of a misunderstanding that will never happen again. As she states in her submissions:
- [S.D.] does not seek to raise evidence of the historic nature of the relationship for any reason other than to explain his subjective intent at the time of the offence, his motive for the touching. The motivation of the offender was not to cause emotional shock or injury .
- [17] A court must craft a sentence based on the particularly individual facts of both the offence and the offender. As stated recently in *R. v. Parranto*, 2021 SCC 46:
- [12] As to the relationship of individualization to proportionality and parity, this Court in *Lacasse* aptly observed:

Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. [para. 53]

Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is "committed in unique circumstances by an offender with a unique profile" (para. 58). This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case (para. 58).

[emphasis added]

[18] Central to the sentencing decision is an assessment of the moral blameworthiness of the offender. As stated in *R. v. Ipeelee*, 2012 SCC 13:

[37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[emphasis added]

[19] In *R. v. Friesen*, 2020 SCC 9, the Court noted that sexual offences encompass a wide spectrum of moral culpability that must be considered and reflected in imposing a proportionate sentence:

[91] These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be "just and appropriate . . . , and nothing more" (M. (C.A.), at para. 80 (emphasis deleted); see also *Ipeelee*, at para. 37). First, as sexual assault and sexual interference are broadly-defined offences that embrace a wide spectrum of conduct, the offender's conduct will be less morally blameworthy in some cases than in others .

[emphasis added]

[20] It is thus critical to evaluate the state of mind of the offender at the time of the offence, and assess, for example, whether the crime was premeditated or predatory, or the result of poor judgement. As stated in *R. v. Ambrose*, 2000 ABCA 264:

[79] This is not the only situation in which lack of remorse may be relevant in sentencing. Sentencing for any crime involves a mix of many principles and factors. Apart from the gravity of the offence, one of the most significant factors influencing sentencing is the state of mind of the accused at the time of commission of the offence. In other words, how blameworthy was the offender when he or she committed the crime? This assessment is now expressly mandated by the overarching sentencing principle in s.718.1 of the Code:

A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[80] In this regard, expressions of lack of remorse, whether through actions or words, may be evidence of a higher degree of moral blameworthiness at the time of commission of the offence. In the same way that stealing a million dollars is more blameworthy than stealing one dollar, so too a hardened attitude towards one's victims is more blameworthy than a temporary lapse in judgment. In other words, lack of remorse as reflected in actions or words may simply be further evidence of the offender's continued indifference to the plight of his or her victims at the time of committing the criminal offence. Manifestations of that type of lack of remorse may accompany the offence as for example where the offender after having abducted a victim compounds the abduction with another offence, such as robbery. This presupposes of course that the time frame over which the offence is committed has been such as to permit the offender to reflect on the consequences of his or her actions before engaging in the further conduct said to evince lack of remorse.

[emphasis added]

[21] Thus, in *R. v. Zazulak*, [1994] 2 SCR 5 at para. 4: "Compelling evidence dealing with the good but misguided motive of the accused should, as stated by the Court of Appeal, undoubtedly count positively in his favour toward sentence." *Zazulak* was a sentencing case concerning perjury rather than sexual assault, but is cited as a general proposition in Clayton Ruby, *Sentencing*, 8th ed. (Toronto: LexisNexis, 2012) at p. 225. See also *R. v. Dyson*, 2016 NWTTC 3 at para. 20, and *R. v. Panek*, 2022 BCPC 115 at para. 57.

[22] As stated by Schreck J in *R. v. Henry*, 2019 ONSC 4978, in the specific context of an appeal from a sentence imposed for sexual assault:

[21] Counsel for the appellant spent considerable time during her oral submissions making the argument that the respondent was "statutorily barred" from concluding that the complainant was consenting because she had consented earlier and, as a result, that his belief that there was consent was irrelevant to his moral culpability. With respect, the appellant has confused criminal liability with moral culpability. The first involves a binary decision: a person is either criminally liable or he is not. The second is a matter of degree. The appellant is correct that the respondent could not legitimately conclude that the complainant was consenting because she had consented earlier: *R. v. Goldfinch*, 2019 SCC 38, at para. 44. That is why he was found guilty. However, this does not mean that his state of mind was irrelevant to his degree of moral culpability. For the reasons outlined earlier, it was open to the

sentencing judge to conclude that it was.

[emphasis added]

[23] S.D. is effectively explaining his actions as a form of mistake of law: he now regrets his actions, and understands that as a matter of fact and of law, the complainant could never have communicated consent to sexual activity while asleep. In *R. v. Suter*, 2018 SCC 34 at paras. 64-65, the Supreme Court of Canada confirmed that while such a mistake may not be relevant to the guilt enquiry, it may be relevant to the sentencing enquiry.

[24] In *R. v. Koenig*, 2019 BCPC 83, the accused pleaded guilty to having exchanged sexually graphic images with a victim who represented herself to be 17 years old, when she was in fact 12. That ignorance provided no defence to that charge. Nonetheless, in assessing his moral culpability, and in crafting a proportionate sentence, the Court was obliged to take into account his mistake in fact and mistake in law:

[54] The Accused operated under a mistake of law. He believed that his actions were not illegal if the Complainant was old enough to consent to sexual activity. Ignorance of the law is not a defence to these charges. However a genuine mistake of law may operate to reduce the moral blameworthiness of an accused and serve as another mitigating factor to be taken into account on sentencing. As the Supreme Court of Canada has recently stated in *R. v. Suter* 2018 SCC 34, although it is not a defence to a criminal charge, mistake of law can be used as a mitigating factor in sentencing, because offenders who honestly but mistakenly believe in the lawfulness of their actions are less morally blameworthy than offenders who are unsure about the lawfulness of their actions, or know that their actions are unlawful.

[emphasis added]

[25] S.D.'s state of mind, based on his erroneous reliance on the parties' alleged past practice of seeking to initiate sexual activity by touching the sleeping partner, is thus relevant to the sentencing enquiry.

[26] With respect to s. 276(2)(c), the evidence sought does not attract the mischief that s. 276 seeks to avoid: wide and invasive scrutiny of the complainant's past sexual history: see *Goldfinch* at para. 33. It is brief, defined, and narrow. It is true that S.D. is not pointing to a specific sexual incident, but rather to the parties' pattern of initiation of sexual activity. But, where appropriate, such evidence may satisfy the requirement of specificity. The majority decision in *Goldfinch* explains the mischief that the requirement of specificity seeks to avoid, and how a contextual and expansive concept of specificity in fact realises the policy objectives of s. 276:

[53] The words "specific instances of sexual activity" must be read in light of the scheme and broader purposes of s. 276. The requirement that evidence be "specific" prevents aimless or sweeping inquiries into the complainant's sexual history. The accused must point to identifiable activity, but the degree of specificity required in a particular case will depend on the nature of the evidence, how the accused intends to use it, and its potential to prejudice

the proper administration of justice. As Doherty J.A. noted in L.S., specificity is required so that judges may apply the scheme in a way that effectively protects the rights of the complainant and ensures trial fairness. A purposive interpretation thus calls for evidence that is sufficiently specific to support a fully informed analysis, allowing the judge to circumscribe what evidence may be adduced and how it may be used.

- [54] Evidence of a relationship that implies sexual activity, such as "friends with benefits", as defined by the accused here, inherently encompasses specific instances of sexual activity. Requiring further details would unnecessarily invade the complainant's privacy, defeating an important objective of the provision. I agree with the statement in L.S. that specifying the parties to the relationship, the nature of that relationship and the relevant time period satisfies the purposes of trial fairness (para. 83). Those criteria are met in this case.
- [27] In Goldfinch, the accused's desired evidence -- that he and the complainant enjoyed a "friends with benefits" relationship - was considered to be sufficiently specific. The evidence failed, however, on the grounds that it was not relevant to an issue at trial. In the estimation of the Supreme Court, the trial judge had failed to precisely identify the relevance of the "friends with benefits" relationship to an issue at trial; instead, the relationship was generally admitted to provide "context". This allowance was particularly prejudicial in Goldfinch: a jury trial. Further, the relationship evidence was solely considered, by the Supreme Court, and seemingly at the trial level, with respect to the legal culpability issue of consent. Goldfinch is silent on whether the friends with benefits evidence could possibly be relevant to the issue of moral culpability in a sentencing hearing.
- [28] With respect to s. 276(2)(d), again, S.D.'s state of mind and impetus for the sexual contact are critical considerations in sentencing. That evidence is brief, with modest intimate details. The evidence of the complainant, if any, in response, would also be brief, rather than a wide-ranging and graphic examination of her sexual history and activities. Examination of that central issue would not prejudice the proper administration of justice.
- [29] These conclusions are reached and fortified by specific analysis of the guiding factors under s. 276(3).
- [30] With respect to (a) ("the interests of justice, including the right of the accused to make a full answer and defence") and (c) ("whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case"): again, this evidence is critical for the defence's ability to make submissions on the appropriate sentence. This is of particular consequence here, as S.D. has no previous criminal record.
- [31] The Crown and the complainant emphasised factors (b) ("society's interest in encouraging the reporting of sexual assault offences"), (f) ("the potential prejudice to the complainant's personal dignity and right of privacy"), and (g) ("the right of the complainant and of every individual to personal security and to the full protection and benefit of the law"), all of which militate against admission.

- [32] That said, again, the evidence is brief, and the avenue of inquiry will be discrete: the past practice of the parties in initiating sexual contact with the other while sleeping. Further, some of the sting faced by a complainant in a sexual assault trial has been considerably lifted: S.D. does not deny that improper sexual contact amounting to sexual assault has occurred, or allege that the complainant consented: he has pleaded guilty, admitted wrongdoing, and expressed remorse. We have moved past the typical "he said-she said" trial on guilt, wherein a complainant faces rejection of her personal credibility, and the prospect of the offender walking away scot-free, as legal violations heaped on top of her physical violations, upon a finding that the Crown has failed to prove its case beyond a reasonable doubt.
- [33] Further, the complainant is scheduled to testify in any case during this Gardiner hearing with respect to the sexual contact itself. In contrast to his claimed touching, she alleges that penetration occurred: a subject of enquiry likely far more invasive and traumatic than the subject matter of the present s. 276 application.
- [34] Finally, the complainant has received the full protection and benefit of the law: the two-stage filtration and protection process set out in s. 276 of the Criminal Code, under which such evidence is only admitted after being scrutinised to ensure that it meets the statutory conditions.
- [35] The observations with respect to (a) and (c) also speak to (d): the need to remove from the fact-finding process any discriminatory belief or bias. S.D. does not seek to adduce this evidence to propagate the harmful stereotype that women who have in past engaged in sexual activity are more likely to have engaged in the activity that forms the basis of the charge. The evidence focuses on his alleged misunderstanding leading to his admittedly wrong sexual touching.
- [36] Factor (e) is irrelevant: there is no jury.
- [37] Finally, there are other important factors militating towards admission, as permitted under (h). Even in the absence of this s. 276 application, the Crown and defence would likely make submissions on the nature of the relationship between the parties at the time of the offence, the historic relationship between the parties, and the motive of the offender, in any case. Further, at the sentencing phase, as here, the rules of evidence and the scope of relevancy are considerably relaxed. Factors guiding the Court's determination of an appropriate and proportionate sentence usually come from the mouth of counsel, rather than from the witness box: hence the s. 724(3) process for determination of disputed facts relevant to the determination of a sentence. The court may also be guided by the convicted person's allocution statement under s. 726. Neither counsel's statements nor the allocution statement are generally subject to cross-examination by the Crown or the complainant; most evidence considered at sentencing is agreed-upon or untested. The admission of this evidence, accompanied by cross-examination of S.D. by the Crown and the complainant, considerably expands and animates the totality of the evidence on which the Court shall craft the

appropriate sentence.

- [38] The previous paragraph largely addresses the primary argument advanced by the Crown: after the accused pleads guilty, he loses the presumption of innocence. The Court should accordingly impose a higher standard on evidence sought to be adduced under s. 276.
- [39] While that argument is appealing, it runs contrary to the firm language of the Supreme Court of Canada in *Gardiner* at pp. 414-15:

One of the hardest tasks confronting a trial judge is sentencing. The stakes are high for society and for the individual. Sentencing is the critical stage of the criminal justice system, and it is manifest that the judge should not be denied an opportunity to obtain relevant information by the imposition of all the restrictive evidential rules common to a trial. Yet the obtaining and weighing of such evidence should be fair. A substantial liberty interest of the offender is involved and the information obtained should be accurate and reliable.

It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.

It is well to recall in any discussion of sentencing procedures that the vast majority of offenders plead guilty. Canadian figures are not readily available but American statistics suggest that about 85 percent of the criminal defendants plead guilty or *nolo contendere*. The sentencing judge therefore must get his facts after plea. Sentencing is, in respect of most offenders, the only significant decision the criminal justice system is called upon to make.

It should also be recalled that a plea of guilty, in itself, carries with it an admission of the essential legal ingredients of the offence admitted by the plea, and no more. Beyond that any facts relied upon by the Crown in aggravation must be established by the Crown. If undisputed, the procedure can be very informal. If the facts are contested the issue should be resolved by ordinary legal principles governing criminal proceedings including resolving relevant doubt in favour of the offender.

To my mind, the facts which justify the sanction are no less important than the facts which justify the conviction; both should be subject to the same burden of proof. Crime and punishment are inextricably linked. "It would appear well established that the sentencing process is merely a phase of the trial process" (*Olah*, *supra*, at p. 107). Upon conviction the accused is not abruptly deprived of all procedural rights existing at trial: he has a right to counsel, a right to call evidence and cross-examine prosecution witnesses, a right to give evidence himself and to address the court.

In my view, both the informality of the sentencing procedure as to the admissibility of evidence and the wide discretion given to the trial judge in imposing sentence are factors militating in favour of the retention of the criminal standard of proof beyond a reasonable doubt at sentencing.

[B]ecause the sentencing process poses the ultimate jeopardy to an individual enmeshed in the criminal process, it is just and reasonable that he be granted the protection of the reasonable doubt rule at this vital juncture of the process [Olah, *supra*, at p. 121].

[emphasis added]

[40] The Crown also advances something of a floodgates argument: allowing this evidence at the sentencing phase, for the purpose of an individualised sentence based on full facts, could undermine the protections and policies underlying s. 276, and expose more complainants to greater, longer, and more frequent testimonial trauma. But, as counsel have seen, in reporting that there is no authority governing this application, the present is a rare circumstance. It will generally only arise in a Gardiner hearing, where the accused pleads guilty, where there are contested facts, and where the contested facts potentially touch upon the subject matter of s. 276. In most contested sexual assault proceedings, the trier of fact will have already made findings of fact with respect to the parties' relationship, consent, and the state of mind of the accused, which findings will in themselves limit the evidence and arguments at the sentencing phase.

[41] S.D.'s application is granted. His evidence, as well as forthcoming examinations of such evidence, on the limited issue of the parties' historic pattern of initiating sexual activity by touching the other whilst sleeping, is permitted.

"Crerar J"

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