SCC File No. 38270

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE ALBERTA COURT OF APPEAL)

B E T W E E N :

PATRICK JOHN GOLDFINCH

Appellant
(Respondent)

- and -

HER MAJESTY THE QUEEN

Respondent
(Appellant)

- and -

ATTORNEY GENERAL OF ONTARIO
CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ONTARIO

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*
Publication Ban pursuant to s.486 of the *Criminal Code*

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PART I - OVERVIEW AND STATEMENT OF FACTS

1. This case raises the question of when evidence of sexual activity in a relationship is admissible in the prosecution of sexual assault related offences. What constitutes relevance and permissible reasoning given the prohibition on stereotypical reasoning under s. 276(1)? AG Ontario submits that the answer to these questions will affect all cases involving relationship evidence, including those where the "other sexual activity" occurred *after* the sexual offence alleged. AG Ontario also proposes a framework to address any evidence that clears the evidentiary thresholds under sections 276(1) and (2). In particular, such admissions must be strictly circumscribed and coupled with jury instructions that acknowledge commonly held myths about consent and explain the permissible use of such evidence in a manner that juries can understand.

PART II - QUESTION IN ISSUE

2. AG Ontario will only address the Appellant's first ground of appeal:

(i) Did the ABCA majority err in its treatment of the relationship evidence, including other sexual activity in the relationship?

In relation to the issue of sexual activity relationship evidence, AG Ontario takes the following positions:

- Pre- and post-offence sexual relationship evidence should be treated consistently;
- Evidence of other sexual activity in a relationship is inadmissible under s.276 solely on the basis of "narrative" or "context"; and
- If admitted, relationship evidence of a sexual nature must be narrowly circumscribed.

AG Ontario takes no position on the outcome of the appeal.

PART III - ARGUMENT

A. Pre- and post-offence sexual relationship evidence should be treated consistently

3. This case presents an opportunity for this Court to adopt a consistent approach to the admissibility of all sexual relationship evidence, whether it took place before or after the alleged assault. The case before this Court relates to evidence of sexual activity between the complainant and the accused that occurred *prior to* the offence. In contrast, the leading authority on sexual relationship evidence in Ontario, *R v LS*, stands for a more expansive approach to admissibility that encompasses both pre- and post-offence sexual activity.[1]

4. In *LS*, the Ontario Court of Appeal admitted sexual relationship evidence that both pre-dated *and post-dated* the alleged assault. In doing so, Doherty JA explained that, "evidence that the relationship …, including the sexual component of the relationship, carried on as it had before the alleged assault was relevant to whether the assault occurred". It was relevant, the Court continued, because it could support the appellant's claim that "the parties carried on as if nothing had happened because nothing had in fact happened."[2] This finding of "relevance" engages the same issues and concerns as those in the case at bar. In both cases, sexual relationship evidence is admitted to support the appellant's claim that the complainant is more likely to have consented to the act in question, or that her assertion of non-consent is less worthy of belief. This is simply, without more, reasoning based on prohibited myths.

5. The admission of *post-offence* sexual relationship evidence presents the same concerns about twin myth reasoning and its potential to distort the trial process. It also contravenes the guidance offered by this Court's jurisprudence. In most cases, post-offence sexual relationship evidence will derive its "relevance" from a combination of impermissible myths or stereotypes about the likelihood of consent, the believability of a complainant and the expected behaviour of a complainant after an assault. This Court in *DD* directed that there is "no inviolable rule on how people who are victims of

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[1] *R v LS*, 2017 ONCA 685 [*LS*]. The Crown could not appeal the admissibility decision in *LS* because the Court applied the *curative proviso* and dismissed the appeal.

[2] *LS, supra* at ¶88, 100 [emphasis added].

trauma like a sexual assault will behave".[3] In *ARJD*, this reasoning was extended to the absence of a change in the behaviour of the complainant.[4] Impermissible inferences cannot be the foundation for admission under s. 276. Just like the failure to make a timely complaint, the absence of a change in behaviour cannot lead to an adverse inference based on stereotypical assumptions of how persons react to trauma.[5] And even in cases where post-offence behaviour may be of some relevance, it is difficult to envision such relevance rising to "significant probative value" capable of outweighing the corresponding prejudicial effect.

6. Principles of contemporaneous consent and sexual autonomy undercut the relevance of other occasions of sexual consent, whether they occur before or after the alleged offence. In most cases involving relationship evidence, it will be sufficient to explain the nature of the relationship without specific reference to other sexual activity. For example, in the case before this Court, the trial Crown proposed the admission of pre-determined facts which outlined the general history of the relationship between the parties, without reference to sexual activity, including that they previously lived together, remained close upon separation, and on occasion, spent nights together. As in *LS*, resort to sexual details would "only have made explicit that which was strongly implied by the evidence the jury heard".[6] Although the Court in *LS* found it was an error to exclude sexual relationship evidence, the *proviso* was applied because the evidence "kept nothing of substance" from the jury.[7] AG Ontario submits that such sexual details must necessarily be excluded, as the prejudicial effect inescapably outweighs probative value that amounts to "nothing of substance".

7. This Court should advance a consistent framework that strictly limits the admissibility of pre- and post-sexual relationship evidence. The approach to relationship evidence, as framed by the Ontario Court of Appeal in *LS*, is at odds with the directives of this Court. It is nevertheless being relied upon

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[3] *R v DD*, 2000 SCC 43 at ¶65 per Major J. [*DD*].
[4] *R v ARJD*, 2017 ABCA 237 at ¶42-48, aff'd 2018 SCC 6 [*ARJD*].
[5] *ARJD (ABCA), supra* at ¶42
[6] *LS, supra* at ¶93
[7] *LS, supra* at ¶101

as the basis for the admission of sexual relationship evidence with increasing frequency in Ontario and it has informed the arguments of both parties in this case.[8] This liberal approach to admissibility stands in direct contrast to the restrictive view of s. 276 adopted by the ABCA in this case and in *Barton*, and should be rejected.

B. Evidence of other sexual activity is inadmissible under s.276 solely for "narrative" or "context"

8. AG Ontario adopts the position of AG Alberta that the admission of evidence of other sexual activity *solely* for the purpose of "context" or "narrative" violates s. 276.[9] As this Court stated in *Darrach*, "[e]vidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent" because "[a]ctual consent must be given for each instance of sexual activity" and evidence of a sexual nature "must be adduced for a permissible purpose and must be relevant to an issue at trial." [10] The onus is on the applicant to "establish a connection between the complainant's sexual history and the accused's defence."[11] Evidence of other sexual activity in a relationship, *whether general or specific and whether pre- or post-offence*, must be excluded where no specific relevance or permissible purpose is articulated. Broad claims of "narrative" and "context" do not suffice. And even where some relevance or permissible reasoning exists, it must be of significant probative value that is not substantially outweighed by the dangers of prejudicial reasoning. To proceed otherwise is to ignore the plain language of s. 276 and the directives of this Court in *Seaboyer* and *Darrach*, and to effectively render sexual relationship evidence admissible in every case involving a sexual assault committed in the context of a relationship.[12]

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[8] For recent examples, see *R v Downey*, [2018] OJ No 5458 (SCJ) at ¶51-52; *R v ED*, [2018] O.J. No. 5175 (Prov Ct) at ¶17, 28; *R v MTP*, [2017] OJ No 6827 (SCJ) at ¶44-45; *R v SM*, 2017 ONSC 6226 (SCJ) at ¶30-34; *R v RV*, 2018 ONCA 547 at ¶42-45, leave to appeal granted, 2018 SCCA No 363. See also, *Appellant's Factum at ABCA* at ¶94; *Respondent's Factum at ABCA* at ¶33. See also, *R v Strickland*, [2007] OJ No 517 (SCJ).

[9] *R v Goldfinch*, 2018 ABCA 240 at ¶46 [*Goldfinch*]; *R v Darrach*, [2000] 2 SCR 443 at ¶56-59 [*Darrach*]; *R. v. Barton* 2017 ABCA 216 at ¶136 [*Barton*], SCC No 37769 (reserved on October 11, 2018).

[10] *Darrach, supra* at ¶58.

[11] *Darrach, supra* at ¶56.

[12] *Ibid* at ¶28-43; *R v Seaboyer*, [1991] 2 SCR 577 at ¶99-101 [*Seaboyer*]; *Barton, supra* at ¶136.

9. The legislative amendments to s. 276 following *Seaboyer* reveal Parliament's intent to (a) specifically capture general sexual relationship evidence under s. 276(1) and (b) strictly limit its admissibility under subsection (2).[13] The previous version of s. 276 did not include a prohibition on sexual activity between the *complainant and the accused*. Rather, it prohibited the admission of "sexual activity of the complainant with any person other than the accused …" The post-*Seaboyer* (and current) version of s. 276 was expanded to include "sexual activity, whether with the accused or with any other person …" Following these amendments, sexual relationship evidence was to be treated like all other sexual activity: it could not be admitted to support an inference that, by reason of the sexual relations, the complainant is more likely to have consented to the activity in issue, or is less worthy of belief. Despite the post-amendment inclusion of sexual relationship evidence under subsection s. 276(1), the mechanism for admission under s. 276(2) remained very restrictive. Subsection 2(c) poses a particularly difficult barrier to evidence of *general* sexual activity given the requirement of "specific instances of sexual activity".[14] The specificity requirement leaves little room for the admission of general relationship evidence absent a very specific, articulated purpose.

10. Despite its inherent prejudicial effect, it is acknowledged that other sexual activity may also be probative where it permissibly speaks to a material fact in issue. The most common such examples are when evidence tends to (a) rebut proof introduced by the prosecution about other sexual activity of the complainant,[15] or (b) challenge the cause of the complainant's physical condition relied on by the

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[13] *Criminal Code*, R.S.C. 1985, c. C-46, s.276; Amended 1992, c.38, s. 276, brought into force August 15, 1992; Amended 2018, c. 29, s. 276, brought into force December 13, 2018.

[14] Formerly subsection 2(a) prior to the recent amendments to s. 276 that came into effect on December 13, 2018 under Bill C-51: An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act, SC 2018, c. 29.

[15] For example, where the complainant's evidence is that she did not consent to the sexual activity in issue because of the nature of the sexual activity, because she would not do so with the accused, or because the relationship itself was platonic. See *R v Harris* (1997), 102 OAC 374 (CA); *R v Butts*, 2012 ONCA 24; *R v Crosby*, [1995] 2 SCR 912.

Crown to enhance the complainant's credibility.[16] By contrast, bare assertions by the accused that the admission of sexual activity is necessary to counter *speculation* by the jury about the nature of the relationship do not meet the test under s. 276. These concerns are speculative themselves. Likewise, the test under s.276 is not met where it is argued that admission is necessary to fairly assess the *accused's* credibility in general and his counter-claim that the complainant consented. The onus to establish a connection between the complainant's sexual history and the accused's evidence is not discharged by assertions that the jury *might* view the assault as having happened between strangers or "out of the blue". The solution to concerns of speculative impact is not to admit sexual evidence that is undeniably susceptible to prohibited reasoning and prejudicial to the truth-seeking function of the trial. Rather, such concerns are most sensibly addressed by simply telling the jury what the general nature of the relationship is (i.e. friends, acquaintances, long-time partners). This fairly situates the parties in the relationship and dispels any notion that they are strangers. It does so directly and effectively, without introducing prejudicial evidence. The jury can also be instructed to not speculate about any gap in the evidence. Resort to the sexual nature of the relationship in these circumstances, however, serves no articulable purpose other than to promote twin myth reasoning.

11. In December 2018, Parliament amplified the conditions for admissibility under s. 276(2) by adding a categorical reminder to judges (under subsection (2)(a)) that the proposed evidence cannot be adduced to support either of the "twin myths" under s.276(1). Section 276(2) now reads:

> **Conditions for admissibility**
>
> **(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

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[16] Examples of physical conditions include semen, pregnancy, injury or disease. See *Seaboyer*, *supra* at ¶101, 200.

(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. [*emphasis added*]

12. The original three conditions for admissibility under s.276(2) remain unchanged: relevancy, specificity and significant probative value.[17] Without anchor to a specific fact in issue essential to the defence, the only "relevance" arising from sexual relationship evidence is entirely founded on impermissible reasoning. It should be the exceptional case where admission is warranted. Fair trial considerations are not the accused's alone.[18] He or she has the right to full answer and defence but not the right to adduce "misleading evidence to support illegitimate inferences" or the right to the most favourable procedures conceivable.[19] The exclusion of evidence under s. 276 is one of many rules limiting the right to present evidence, even where relevant. And such exclusion is justified where prejudicial evidence will likely do more harm than good to the trial process and cannot be overcome by instruction.[20]

C. If admitted, relationship evidence of a sexual nature must be narrowly circumscribed

13. Evidence of other sexual activity between the complainant and the accused has the potential to distort the trial process by unfairly disparaging the complainant.[21] In the exceptional cases where such evidence has an articulable and permissible purpose, its admission and use must be narrowly circumscribed. The Ontario AG proposes the measures outlined below to guard against a) the expansion of other sexual evidence as the trial progresses, and b) any corresponding reliance on prohibited myths or stereotypes.

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[17] The admissibility conditions were reordered as s. 276(2)(b), (c) and (d), but were otherwise unaltered by the 2018 amendments.

[18] *Darrach, supra* at ¶24; *R. v Harrer*, [1995] 3 SCR 562 at ¶45.

[19] *DD, supra* at ¶48-53 per Major J.; *R. v. Mills*, [1999] 3 SCR 668 at ¶72-76; *Darrach, supra* at ¶24; *R. v. Boone*, 2016 OJ No 1585 (CA) at ¶44; *R. v. Osolin*, [1993] 4 SCR 595 at ¶166-168.

[20] *Darrach, supra* at ¶42; *DD, supra* at ¶37 per Major J.

[21] *LS, supra* at ¶66, 79-80.

i. Prior Vetting of All Evidence Admitted under Section 276

14. All sexual relationship evidence, including that led by the Crown, should be vetted by the court in advance of the trial proper. Adoption of such a practice is consistent with the presumptive inadmissibility of sexual history evidence. While the Crown is not bound by the procedural requirements under s.276.1 and 276.2 (now ss. 278.93 and 278.94), *all* evidence of other sexual activity of the complainant is subject to judicial determination regarding its use under s.276(1) and to common law admissibility considerations under *Seaboyer*. Pre-trial determinations promote trial fairness and the truth-seeking function of the court process by limiting, at the outset, the admission of evidence that is particularly susceptible to prejudicial reasoning. These discussions will focus all parties on the legitimate use of such evidence and ensure that trial judges adequately understand the context. Importantly, this approach will establish the parameters of any sexual relationship evidence that the Crown seeks to adduce, and act as a trigger for defence counsel to consider whether he or she needs to bring an application under s. 276(2) for additional evidence of sexual activity beyond that proposed by the Crown.

ii. Constraints on the Introduction of Other Sexual Evidence

15. Where general sexual relationship evidence meets the requirements under s. 276(1) and (2), it should be reduced to an agreed statement of fact (as contemplated by the trial judge in this case). In the alternative, counsel should be permitted to lead their witnesses through such evidence. Both measures would protect against the expansion and exploitation of evidence admitted under s. 276. The case before this Court is a good example of the practical dangers in not proceeding this way.[22] These two measures will guard against a) inadvertently eliciting evidence from the complainant beyond the parameters of the ruling, b) opening the door to highly prejudicial evidence in response, and c) positioning the accused to offer irrelevant, repetitive and inflammatory characterizations of the sexual relationship with the complainant.

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[22] *SCC Record of the Appellant*, Vol I, pp 80-81, Vol II, pp 80-81, 112, 117-118, Vol III, p 194, 201, 203, 227-229.

iii. Amplification of Jury Instructions

16. Prejudicial reasoning that arises from the admission of other sexual evidence is, in many cases, not curable by a limiting instruction. Section 276 itself is an explicit acknowledgement by Parliament that juries are not "well-equipped" to deal with particularly pernicious evidence.[23] As a result, in cases where sexual evidence is admitted under s. 276, AG Ontario is proposing an amplified instruction to the jury. Section 276.4 (now s. 278.96) requires specific instructions to the jury outlining the proper use of evidence of other sexual activity. Unchecked myths and stereotypes can lead to unfair assessments of complainants' credibility and worth in sexual assault trials. Judges have a responsibility to follow this Court's direction in *R. v. Seaboyer* "to take special care to ensure that, in the exceptional case where circumstances demand that such evidence be permitted, the jury is fully and properly instructed as to its appropriate use."[24]

17. Currently, trial judges broadly caution the jury against using other sexual activity to infer the complainant is more likely to have consented to the sexual activity in question, or to infer that the complainant is less worthy of belief.[25] To be effective, however, this limiting instruction requires amplification. It is more likely to resonate with a jury if the permissible and impermissible uses are explicitly outlined for them.[26] Telling a jury that sexual relationship evidence is being admitted strictly for context or narrative, without more, is of little assistance to a jury.[27] The trial judge must draw a direct line between the other sexual activity and its relevance and permissible uses. It is a strong indication that the evidence should never have been admitted in the first place if a trial judge is unable to explicitly articulate this for the jury.

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[23] *R v SB*, [2016] NJ No 158 (CA) at ¶101-103, per Green CJNL, dissenting; dissent aff'd [2017] SCJ No 16; *Seaboyer, supra* at ¶24.

[24] *Seaboyer*, *supra* at ¶100.

[25] For example, see Watt, David. *Watt's Manual of Criminal Jury Instructions*, Scarborough, ON: Thomson/Carswell, Final 38 - Evidence of Other Sexual Activity.

[26] *R v Barton*, *supra* at ¶148-150, 160-163, 182; *R v JA*, 2011 SCC 28 at ¶31, 34, 39-47.

[27] For example, see the instruction in this case (*SCC Record of the Appellant*, Vol III, p 362).

18. Further, the impermissible uses must be explicitly delineated. The general prohibition on twin myth reasoning would be more readily understood if juxtaposed against commonly held myths about consent, generally and in the context of a relationship. AG Ontario proposes the following instruction:

> You are prohibited from using evidence of other sexual activity between the complainant and the accused to infer that the complainant is more likely to have consented or is less reliable or believable as a witness. You cannot do so ***because*** there is no such thing as advance consent, habitual consent or implied consent. Being in a relationship does not change that. Consent must be communicated to one's partner each time, in respect of every sexual act. It cannot be implied from the relationship between the accused and the complainant. Consent can be revoked at any time during sexual activity. Silence, passivity or ambiguous conduct is not communicated consent. Consent to sexual activity with the accused on another occasion, whether before or after the alleged offence, is irrelevant to whether the complainant consented to the incident in question and to whether you find the complainant's testimony to be true.

PART IV - SUBMISSIONS RESPECTING COSTS

19. The intervener makes no submissions as to costs.

PART V - NATURE OF ORDER SOUGHT

20. The intervener makes no submissions as to the outcome in this appeal.

ALL of which is respectfully submitted this 4th day of January, 2019.

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Jill Witkin

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PART VI - TABLE OF AUTHORITIES

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