WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. R.V., 2018 ONCA 547
DATE: 20180613
DOCKET: C63495

MacFarland, Watt and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

R.V.

Appellant

Jonathan Dawe, for the appellant

Katie Doherty, for the respondent

Heard: May 16, 2018

On appeal from the conviction entered on October 27, 2016 and the sentence imposed on March 22, 2017 by Justice Robert Gee of the Ontario Court of Justice.

Paciocco J.A.:

OVERVIEW

[1] It is critically important to protect complainants from questioning about their sexual activity when that sexual activity does not form the subject-matter of the charge. There are constitutionally guaranteed equality and privacy interests at stake. There are also access to justice concerns arising from the deterrent effect that allowing questions about deeply personal matters can have on the readiness

of victims to report sexual offences. And there are compelling concerns, particularly acute in jury trials, that such questioning can feed rape myths, potentially distorting the outcomes of cases.

[2] Notwithstanding these powerful considerations, there are times when such questioning must be permitted. When applied properly, s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46 strikes the balance. This is one of those cases where a proper balancing under s. 276 requires that such questioning be permitted.

[3] Here, the Crown claimed that the complainant's pregnancy corroborated her sexual assault allegation. The implication being that only the accused, R.V., could be the father. Yet the application judge[1] refused to allow R.V. to attempt to challenge that proposition when cross-examining the complainant, a witness who would clearly be able to answer those questions. That decision was in error.

[4] A second error occurred after the application judge who made the s. 276 ruling was unable to continue with the trial. When the trial judge took over the trial pursuant to s. 669.2, he held that he could not reconsider the application judge's s. 276 ruling, because s. 669.2 judges are bound by rulings made by the judge

---

[1] For reasons I will explain, two judges participated in R.V.'s trial. The first judge heard and ruled on the initial s. 276 application but was subsequently unable to continue with the trial. A second judge took over. To avoid confusion between the two judges I will refer to the first judge as the "application judge" and the second as the "trial judge".

they replace. That is not so. As I will explain, in the particular circumstances of this case, this error mattered.

[5] I would therefore allow R.V.'s conviction appeal and order a new trial.

ISSUES

[6] There are two general issues in this appeal that warrant consideration. The first issue also raises several sub-issues that must be addressed:

A. Did the application judge err in refusing to permit R.V. to conduct any cross-examination of the complainant about sexual activity that does not form the subject-matter of the charge?

(1) Is there a fixed rule requiring cross-examination or other evidence tending to prove that a person other than the accused caused the physical consequences of sexual assault that the Crown relies upon to prove the offence?

(2) Did the application judge err in her application of the s. 276(2)(a) requirement that, to be admissible, evidence must be of "specific instances of sexual activity"?

(3) Did the application judge err in balancing the competing interests under s. 276?

(4) If there was an error in the application of s. 276, did it cause a substantial wrong or miscarriage of justice?

B. Did the trial judge err in holding that the application judge's s. 276 ruling was binding on him pursuant to s. 669.2?

[7] Given my conclusion that the errors pertaining to these grounds of appeal warrant a new trial, I will not address R.V.'s other grounds of appeal, or his sentence appeal.

BACKGROUND FACTS

A. THE ALLEGED ASSAULT

[8] R.V. and the complainant are cousins. They were camping with members of their extended family during the 2013 Canada Day long weekend. The complainant testified that in the early morning hours of July 1, 2013, R.V. lured her into a campground washroom where he sexually assaulted her in a shower stall. He was 20 years old at the time. She was 15. Both the complainant and R.V. had consumed alcohol earlier that night.

[9] The complainant testified that R.V. forced sexual kissing on her and attempted to grope her and remove her shirt. He directed her onto the ground and removed their bottom clothing. While on top of her, he placed his penis near her vagina while holding her arms stretched out by her wrists. She testified that she

did not remember what happened next, a period she referred to in cross-examination as a “black out situation”.

[10] Her next memory was of R.V. slowly releasing her wrists. She said that he told her not to tell anyone what had happened and then left.

[11] The complainant testified that her vagina felt wet and sticky and she felt “disgusted” and so went and cleaned herself up. She told no-one what had happened.

[12] R.V., who testified, denied that he had any sexual contact with the complainant.

B. THE MEDICAL APPOINTMENTS

[13] Throughout the summer, the complainant felt sick. She complained of abdominal pain and nausea. She went to see Dr. Montgomery towards the end of August.

[14] Dr. Montgomery testified that the complainant told her of her symptoms. The complainant also told Dr. Montgomery that she had not had her period since June, but denied sexual activity when asked. On August 29, 2013, Dr. Montgomery requisitioned an ultrasound of the complainant’s abdomen. She also arranged a routine urinalysis that included a pregnancy test.

[15] Before the complainant went for the ultrasound, she had sexual intercourse with her then 17 year old boyfriend. This occurred on September 2, 2013.

[16] On September 14, 2013, the complainant had the ultrasound. During the ultrasound she learned that she was pregnant, something she already feared from a positive home pregnancy test. She believed her boyfriend was the father.

[17] Dr. Montgomery saw the complainant again on September 17, 2013 to discuss the urinalysis results, which confirmed that the complainant was pregnant. The complainant disclosed the September 2, 2013 sexual intercourse with her boyfriend to Dr. Montgomery but “denied other intercourse”. She told Dr. Montgomery she could see a baby and hear the foetus’s heartbeat during the ultrasound. This would not be possible if the complainant was impregnated on September 2, 2013, so Dr. Montgomery ordered another ultrasound for the next day, September 18, 2013. That ultrasound provided an estimated gestational age for the foetus of 13 weeks and 5 days. The standard practice permits a variance from the estimated gestational age of between 5 to 7 days either way.

[18] Dr. Montgomery discussed the results with the complainant the same day, providing the complainant with her estimate of the time of conception. She asked the complainant further questions. During cross-examination, Dr. Montgomery confirmed that the complainant told her that while camping with the family during Canada Day weekend 2013, and while drunk, she walked to the bathroom with her

cousin R.V., that she was scared to say no, that R.V. tried to penetrate her, and that there was “cum” “outside” of her vagina.

[19] Dr. Montgomery arranged for the complainant to visit a women’s health clinic and then discharged her duty by reporting the complainant’s situation to the Children’s Aid Society (“CAS”).

[20] On September 20, 2013, the police contacted Dr. Montgomery, obviously having been alerted by the CAS. They also contacted the complainant and arranged for her to give a statement at the police station on September 23, 2013.

[21] By the time she gave her statement on September 23, 2013, the complainant had terminated the pregnancy. The foetal remains had already been destroyed on September 21, 2013, making it impossible to confirm paternity through DNA testing.

C. THE TRIAL

[22] R.V. was charged with sexually assaulting and touching the complainant for a sexual purpose with his penis when she was under 16 years of age contrary to ss. 271 and 151 of the *Criminal Code*.

[23] Pre-trial motions were held, including R.V.’s s. 276 application. The application judge denied the motion for reasons that will be outlined below.

[24] The scheduled trial date was adjourned. For reasons immaterial to this decision, the application judge who decided the s. 276 application declared herself unable to continue with the trial. Another judge – the trial judge – was assigned, and he made the appropriate order under s. 669.2, finding that the application judge was unable to continue. He then assumed carriage of the trial that had already commenced, but in which no evidence had been heard on the merits.

[25] R.V. immediately asked the trial judge to reconsider the application judge's s. 276 decision. The trial judge declined to do so. He found that the application judge's s. 276 ruling was binding on him. He went on to comment that even if it was not, he would not have reconsidered her ruling based on an identical application in the absence of a change of circumstances.

[26] As I will explain in more detail in my analysis of the second ground of appeal, changes in circumstances did occur as the trial unfolded. However, defence counsel did not renew his s. 276 request.

ANALYSIS

A. REFUSING TO PERMIT R.V. TO CONDUCT ANY CROSS-EXAMINATION OF THE COMPLAINANT

[27] It is undisputed that by the time R.V. brought his s. 276 application, the Crown intended to rely on proof of the complainant's pregnancy as evidence of the sexual assault. In the absence of biological confirmation of paternity, the bridging

inference the Crown was seeking between the pregnancy and R.V.'s guilt was that only R.V. could have impregnated the complainant. In effect, in opposing the s. 276 application, the Crown's position amounted to this: we say you are the only one who could have impregnated the complainant but you are not allowed to question her about whether this is true. In my view, this is a patently unfair outcome that cannot be justified in the circumstances of this case.

[28] The appeal Crown did not dispute the relevance in questioning the complainant about whether she had sexual experiences with others that may have led to her impregnation. Instead, the appeal Crown said that R.V.'s application asked for too much. More importantly, she also urged that R.V.'s application could not meet the legal test since it was "without foundation". She argued that the law supports the trial judge's discretionary decision to deny R.V.'s application in its entirety and asked that we give substantial deference to the application judge's decision, as required by this court's decision in *R. v. M.T.*, 2012 ONCA 511, 289 C.C.C. (3d) 115, at para. 54.

[29] I accept the Crown submission that the scope of R.V.'s s. 276 request was extravagant. He sought leave "to question the Complainant about her prior sexual activity, with the Applicant, or any other individual, that may have occurred between June 1st and July 1st, 2013". In fact, relevant cross-examination arising from the tactical position taken by the Crown would be confined to questions about

sexual activity between the complainant and persons other than R.V. that could account for the pregnancy.

[30] Yet the over-breadth of R.V.'s formal request had nothing to do with the application judge's decision to disallow R.V.'s s. 276 application. She recognized what R.V. was seeking: "I appreciate that the defence seeks to challenge any potential inference that the alleged sexual activity was the only possible cause of the pregnancy and hence the pregnancy may corroborate the complainant's account." In my view, the imprecision in R.V.'s formal request for relief would not have provided the application judge with a basis for denying him the opportunity to ask relevant questions.

[31] Nor does the law support the trial judge's decision. The cross-examination proposed by R.V. was adequately identified to satisfy the "specific instances of sexual activity" requirement in s. 276(2)(a). The application judge therefore erred in concluding that R.V.'s application was not legally capable of satisfying s. 276. I also conclude that she committed a reversible error when balancing the probative value and prejudicial effect of the evidence.

[32] I will begin, however, by rejecting R.V.'s argument that there is a fixed rule that governs his case, requiring that his s. 276 application be granted.

(1) Is there a fixed rule governing this case?

[33] R.V. argued in his factum that the Supreme Court in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 held that ss. 7 and 11(d) of the *Charter of Rights and Freedoms* "[require] defendants in sexual assault cases to be allowed to adduce evidence of other sexual activity by a complainant in order 'to explain the physical conditions on which the Crown relies to establish intercourse … such as pregnancy'." I disagree. *Seaboyer* does not go this far.

[34] In *Seaboyer*, a majority of the court struck down prior rape shield legislation because it attempted to predefine, with fixed rules, when prior sexual experience evidence would be probative enough to be admissible. The majority held that the problem in approaching the admissibility issue in such a way was that relevance, probative value, and prejudice in all of its forms are fact-specific considerations that vary depending on the circumstances of the case. This makes it perilous to attempt fixed rules. I agree with the Crown that *Seaboyer* cannot be read as erecting the same kind of fixed admissibility regime that it struck down.

[35] The wisdom in avoiding fixed rules is easy to demonstrate. For example, if there had been DNA evidence confirming that R.V. was not the one who impregnated the complainant, evidence about the complainant's other sexual experiences would add nothing of value. A fixed rule permitting such questioning would create needless prejudice.

[36] Moreover, it is clear from the passages that R.V. relied upon that *Seaboyer* was not attempting to set down a fixed rule. The passage from *Seaboyer* partially quoted in the passage from R.V.'s factum I reproduced above actually says that such evidence "may be relevant to explain physical conditions" (emphasis added): at p. 614. Before listing "evidence of specific instances of sexual conduct tending to prove that a person other than the accused caused the physical consequences of the rape alleged by the prosecution" as an example of admissible evidence, McLachlin J. (as she then was), prefaced that and the other examples she was about to give, saying "evidence of consensual sexual conduct on the part of the complainant may be admissible" (emphasis added) where its probative value is not substantially outweighed by its prejudicial effect: at p. 635.

[37] There is no fixed rule allowing accused persons to prove that the complainant's other sexual activities may have caused a physical condition the Crown relies upon to confirm an alleged offence. *Seaboyer* does, however, affirm that such cases exemplify situations where the proof of other sexual activity may well be important enough to admit, a point I will return to below.

(2) Does the "specific instances of sexual activity" requirement preclude R.V.'s application?

[38] The application judge decided that R.V.'s s. 276 application should be dismissed because it was not capable of meeting the test set out in s. 276(2). The application judge offered two reasons for this conclusion. The first reason, which I

address now, was that the “the proposed questioning is not of specific instances of sexual activity” as required by s. 276(2)(a), and therefore incapable of satisfying s. 276(2).

[39] Taken as a whole, the application judge’s reasons suggest that she made this determination for the reasons advanced on appeal by the Crown, namely, that the request for cross-examination was without foundation as R.V. did not offer an evidentiary basis that the complainant engaged in identified instances of sexual activity that could have caused her pregnancy. As a result, the trial judge found “the probative value of the proposed questioning is at best speculative”, and that “the proposed questions are more in the nature of a fishing expedition to ask about any sexual activity over a defined timeframe.”

[40] In my opinion, the application judge erred in effectively concluding that s. 276(2)(a) always requires particularization of identifiable instances of sexual activity, and in rejecting R.V.’s application because it did not meet that standard. What s. 276(2)(a) requires is adequate identification of the target evidence to enable a proper s. 276 evaluation to be undertaken, and to enable the Crown to safeguard the complainant’s legitimate interests. The application judge understood that R.V. was seeking to cross-examine the complainant about the particular occasions in the month of June 2013 when the complainant engaged in sexual activity capable of impregnating her. In my view, that adequately identified the

evidence he sought through his proposed cross-examination, to meet s. 276(2)(a)'s requirements.

[41] Section 276(2) provides, in material part:

> 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…

[42] This court has held that "the degree of specificity required to meet s. 276(2)(a) depends to a large extent on the nature of the sexual activity that the accused seeks to adduce": *R. v. L.S.*, 2017 ONCA 685, 354 C.C.C. (3d) 71, at para. 83. Section 276(2)(a) does not always require identification of the details of specific sexual encounters. Accordingly, Doherty J.A. held, at paras. 84-85, that a request by a husband to "introduce evidence that during the currency of his spousal relationship with [the complainant], both before and after the alleged assault, he and [the complainant] engaged in consensual sexual intercourse", adequately identified "the sexual activity in respect of which he sought to adduce evidence."

[43] The evidence sought in *L.S.* was adequately identified because it enabled the purposes behind s. 276(2)(a) to be achieved. Justice Doherty explained the role of s. 276(2)(a) in these terms, at para. 82:

> This provision is designed to ensure that the nature of the proposed evidence is properly identified so that the criteria for admissibility in s. 276(2) can be accurately applied. This provision also serves to ensure that the Crown has full notice of the evidence to be adduced and that the complainant's legitimate interests can be properly safeguarded…
>
> [Citation omitted.]

[44] The court, aware of the evidence L.S. wanted to secure, was then able to apply the remaining admissibility requirements of s. 276. The Crown also had adequate notice of what to expect. It was well-positioned to protect the legitimate interests of the complainant, even though no particularized instances of sexual activity had been identified.

[45] Thus the phrase "specific instances of sexual activity" does not require, as a necessary condition, the particularization of identified instances of sexual activity. It requires instead that the proposed evidence be adequately identified to enable a proper s. 276 evaluation to be undertaken, and for the Crown to safeguard the complainant's legitimate interests.

[46] Where the defence is seeking to lead affirmative exculpatory evidence, the question is whether that proposed evidence has been adequately identified.

Where, as here, the defence seeks to obtain evidence through cross-examination, it is the subject area of the cross-examination that must be adequately identified.

[47] There are good reasons for interpreting s. 276(2)(a) this way, apart from the fact that this interpretation is supported by the natural language of the provision, while still preserving the evident objective of s. 276(2)(a).

[48] First, an “adequate identification” interpretation suits the overall legislative scheme in a way that a “particularized identification” requirement would not. This is because s. 276 does not serve only the legitimate personal and public interests in protecting complainants. It is a provision that is relied upon to broker competing interests, including the right of the accused to make full answer and defence and the personal and public interests in arriving at a just determination for accused persons. Interpreting s. 276(2)(a) as requiring an accused person to know the answers to relevant questions that only the complainant is apt to know before those relevant questions can be asked in cross-examination does not balance competing interests. It creates an imbalance that can create not only unfairness, but injustice.

[49] I agree with comments made by Spies J. in *R. v. Nkemka*, 2013 ONSC 2121. In *Nkemka*, the Crown was alleging that the accused injured the complainant’s vagina. It then attempted to prevent Mr. Nkemka from cross-examining the complainant about whether sexual activity with others in the relevant 48 hour period could have caused those injuries, by insisting that Mr. Nkemka first

particularize the specific sexual activity he wanted to ask about. Justice Spies said, at para. 6:

> In my view, in these circumstances the precondition requiring disclosure by the defence of specific incidents of prior sexual activity cannot be interpreted in a way that requires the Defence to give particulars of something Mr. Nkemka would have no way of knowing; he would have no information about specific incidents of prior sexual activity in this case unless given an opportunity to question the Complainant.

[50] Second, interpreting s. 276(2)(a) as allowing other sexual activity evidence to be admitted only where specific instances of sexual activity are identified with granular particularity would create an absolute rule of exclusion for general evidence about sexual experience, no matter how relevant and probative it is, or how low its prejudicial impact would be. In my opinion, Parliament could not reasonably have intended such a result.

[51] I say that interpreting s. 276(2)(a) as imposing a particularized foundation requirement would have this unwarranted effect because s. 276(2) *prima facie* prevents the accused from adducing any evidence of sexual activity other than the sexual activity that forms the subject-matter of the charge, unless three preconditions are met, including s. 276(2)(a)'s "specific instances of sexual activity" requirement. For example, in *L.S.*, an interpretation of s. 276(2)(a) requiring a particularized foundation to the admission s. 276 evidence would have prevented L.S. from offering evidence that he and his complainant spouse engaged in

consensual sexual intercourse both before and after the alleged assault, which was found by this court to be relevant and probative.

[52] Perversely, if L.S. were required to identify particularized instances of the complainant's previous sexual conduct to win the right to cross-examine her so that he could show the sexual nature of their relationship, he would have had no choice but to first disclose specific details of their sexual activity. Instead of protecting the sexual privacy of the complainant, this would have compromised it.

[53] As such, it is not surprising that courts have consistently held that an accused person applying to engage in relevant cross-examination of complainants about their sexual conduct on other occasions need not particularize that other sexual activity as a precondition to obtaining a s. 276 order. What matters is that the proposed line of questioning be adequately identified.

[54] In *R. v. Aziga*, [2008] O.J. No. 4669 (S.C.), Mr. Aziga was alleged to have committed aggravated assault by infecting complainants with HIV. In response, Mr. Aziga was permitted to cross-examine those complainants about other sexual activity that may have led to their infection, even though he did not know whether they had actually engaged in other sexual activity. His line of questioning sought evidence that would have clear probative value, and when the s. 276 balancing was done, the proposed cross-examination was allowed.

[55] In *R. v. Rodney*, [2008] O.J. No. 528 (S.C.), Mr. Rodney, a black man, was permitted to cross-examine the complainant about her statement that every black man "I have ever met raped me." This cross-examination was intended to show her bias. The Crown attempted to prevent the cross-examination by challenging Mr. Rodney to particularize the other instances of alleged rape, which of course, Mr. Rodney could not do. The trial judge nonetheless permitted the cross-examination because the information sought was probative.

[56] In *Nkemka*, Mr. Nkemka was permitted to cross-examine the complainant about whether she engaged in other sexual activity that could account for the injury to her vagina that the Crown alleged Mr. Nkemka had caused. Mr. Nkemka had no idea whether she had any sexual contact with anyone else in the relevant 48 hours, but he did not have to, as his proposed line of cross-examination sought information that would have probative value.

[57] In *R. v. Ralph*, 2014 ONSC 1072, Mr. Ralph was permitted, without particularized information, to cross-examine the complainants about whether they had ever engaged in consensual sexual intercourse with anyone they knew or believed to be HIV positive before he was alleged to have infected them. This cross-examination was undertaken in an effort to raise a reasonable doubt about the complainants' claims that they would not have consented to sex with Mr. Ralph if he had told them he was HIV positive.

[58] In each of these cases, the trial judges, having been given the proposed line of cross-examination, had adequate identification of the target evidence to enable a proper s. 276 evaluation to be undertaken. In addition, the Crown had sufficient notice to make submissions and safeguard the complainants' legitimate interests.

[59] The same holds true, in my view, in this case. For convenience, I will begin with the Crown's interest in s. 276(2)(a).

[60] It is clear from the trial Crown's submissions made during the three s. 276 application appearances that he was well aware that R.V. wanted to cross-examine the complainant about instances where she may have had other sexual experiences that could have caused the pregnancy. The Crown was well-positioned to participate in the s. 276 application and safeguard the complainant's interest. It had adequate information in order to consult the complainant beforehand, and to make admissibility arguments during the s. 276 application.

[61] The application judge also had sufficient information to determine the admissibility of R.V.'s evidence.

[62] She showed no insecurity in evaluating the risks of prejudice, which she did in some detail. She also had sufficient information to recognize that "the defence does not intend such evidence to further the twin myths that, a) other sexual activity makes the accused more likely to have consented or, b) that the sexual activity makes her less worthy of belief." Her reservation related to the evaluation of the

probative value of the evidence was because she considered that “the probative value of the proposed questions [was] at best speculative.”

[63] I am persuaded that the probative value of the proposed cross-examination was not, in fact, speculative. If the cross-examination disclosed other potential causes for the complainant’s pregnancy, the impact would be significant, for it would entirely neutralize the Crown’s attempt to claim that the pregnancy corroborated the sexual assault allegation. On the other hand, if the cross-examination failed to disclose other potential causes for the complainant’s pregnancy, then the complainant’s answers would assist the Crown’s theory.

[64] The probative value of the line of questioning itself was not speculative. What was speculative was whether R.V.’s cross-examination of the complainant would succeed in securing the evidence he sought. However, uncertainty of result does not deprive a line of questioning of its probative value. In my view, when considering probative value, the application judge’s focus was wrong. She erred by effectively inquiring whether there was a foundation for concluding that the cross-examination would succeed in exposing other potential causes of the complainant’s pregnancy, instead of whether the line of cross-examination itself had probative value.

[65] In sum, the “specific instances of sexual activity” requirement in s. 276(2)(a) does not require accused persons to present the particularized foundation the

application judge insisted upon. It requires that the proposed evidence or cross-examination must be adequately identified to enable the admissibility of the evidence to be properly determined, and for the Crown to protect the legitimate interests of complainants. R.V.'s application did that. The application judge therefore erred in finding that his application was not capable of meeting the test set out in s. 276(2) because it did not meet the "specific instances of sexual activity" requirement in s. 276(2)(a).

(3) Did the application judge err in balancing the competing interests?

[66] Although she did not say so overtly, it is evident from reading her decision that the application judge had a second reason for her conclusion that R.V.'s evidence was not capable of meeting the admissibility standards in s. 276(2). In her view, R.V.'s proposed cross-examination did not have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice." In my view, this second basis for rejecting R.V.'s claim was also in error.

[67] R.V. raises several specific grounds of appeal relating to this determination. It is not necessary to address them all to demonstrate that the balancing undertaken by the application judge was wrong.

[68] As I have already indicated, the application judge erred by finding the probative value of the proposed cross-examination to be “speculative” and “highly uncertain”, when it was not.

[69] She also erred, in my view, by characterizing the proposed cross-examination as a “fishing expedition”, and “exactly the kind of tangent the section was designed to prevent.” R.V.’s proposed cross-examination was neither a “fishing expedition” nor a “tangent”.

[70] It was not a fishing expedition because R.V. was not asking to engage in a vexatious or frivolous attempt to troll to see what potentially useful evidence he might snag. The Crown had made a pointed allegation against R.V. that he impregnated the complainant during the sexual assault and was relying on that pregnancy as corroborative evidence. R.V. was proposing to probe the veracity of that allegation by asking relevant questions of the only witness apt to know whether that was true. This was not a fishing expedition, and the line of questions was certainly not a tangent. It was responsive to an important plank in the Crown’s case.

[71] In my view, the application judge also erred in finding that, as a substitute for the cross-examination he was proposing, R.V. could pursue the alternative strategy of cross-examining “the complainant as to whether she was truthful in her

statement that she was a virgin and further what her understanding is of the term 'virgin'." Some more factual background is useful to explain this error.

[72] The complainant's position going into the trial was that she remained a virgin even though R.V. impregnated her. In her taped police interview, the complainant said that she lost her virginity when she had sex with her boyfriend on September 2, 2013, two months after the alleged sexual assault. She said that:

> we all know when you lose your virginity you have like blood spottings and it's actually painful and that was actually what happened with me that day when I I had when I was having sex with my boyfriend but when when it happened with [R.V.] like I didn't it wasn't it like it wasn't painful and like I wasn't spotting…

[73] During the s. 276 application, the trial Crown's main submission was that R.V. did not have to ask the complainant about her other sexual experiences to respond to the Crown's claim that he was the father. Citing decisions that hold that virginity is a status and not a sexual experience, the trial Crown suggested that R.V. could rest content to cross-examine the complainant on her claim that she was a virgin at the time of the alleged assault.

[74] The application judge took up this suggestion. She held that R.V. did not need to ask the complainant about her sexual experiences because he could challenge the complainant's paternity claim by using the medical evidence of the gestational age of the foetus (a point I will return to), and by "cross-examination of

the complainant as to whether she was truthful in her statement that she was a virgin and further what her understanding is of the term ‘virgin’".

[75] In my view, the cross-examination envisaged by the application judge was not a meaningful substitute for the cross-examination R.V. sought. The invitation to ask the complainant whether she was telling the truth about her virginity was a pointless exercise. Cross-examination involves posing questions that challenge the testimony that has been given. Asking a witness whether they are telling the truth in making a claim is effectively no cross-examination at all.

[76] Asking a complainant only about her understanding of the term “virgin” is equally pointless. Exposing the complainant’s apparent confusion about the meaning of virginity would get R.V. nowhere unless he could go on to ask the complainant whether she engaged in any other sexual activity capable of impregnating her while maintaining her understanding of virginity.

[77] Indeed, in my view the entire premise that R.V. could cross-examine the complainant about her claim to virginity without a s. 276 ruling was wrong in law. This kind of cross-examination is not an alternative to a s. 276 application. Rather, it requires a successful s. 276 application.

[78] To be sure, it is well-settled that a complainant can testify to her virginity without triggering s. 276. As explained in *R. v. Pittiman* (2005), 198 C.C.C. (3d) 308 (Ont. C.A.), [2005] O.J. No. 2672, at para. 33, affirmed 2006 SCC 9, [2006] 1

S.C.R. 381, “evidence of a complainant’s virginity is a question of physical fact”, not a sexual experience.

[79] It does not follow, however, that defence challenges to claims of virginity fall outside of s. 276. Such a challenge by its nature entails the proposition that the complainant has had sexual experiences. Even a binary question about virginity, such as, “are you telling the truth when you say you were a virgin?” invites the answer “no”, which is evidence of sexual experience. Cross-examination that challenges claims about the absence of sexual experience falls squarely within s. 276.

[80] The leading decision in the area, *R. v. Brother* (1995), 169 A.R. 122 (C.A.), does not address this issue. There is also nothing in *Pittiman* that says otherwise. Indeed, although *Pittiman* can be read as being agnostic on this point, Weiler J.A. did not disagree with the Crown’s insistence that while the complainant was free to claim virginity, the defence had to comply with s. 276 to confront that claim. She simply noted that it may be too late to follow the procedure in s. 276 when the complainant offers such testimony unexpectedly: *Pittiman*, at para. 37.

[81] The application judge therefore erred in her evaluation of the probative value of R.V.’s proposed cross-examination. She should have examined the probative value of the proposed line of questioning itself instead of requiring R.V. to demonstrate, with a particular evidentiary foundation, that his cross-examination

was apt to succeed in exposing other potential causes of the complainant's pregnancy.

[82] Her attempt to find an alternative approach that would reduce the need for the proposed cross-examination was also wrong in law. She erred by permitting a cross-examination that required a successful s. 276 application while at the same time denying his s. 276 application. Although this error did not prejudice R.V., he was prejudiced by the application judge's error in treating pointless lines of questioning as diminishing the importance of the relevant cross-examination that R.V. sought.

[83] Given these legal errors, the application judge's s. 276 decision is not entitled to deference. In my view, the only reasonable outcome in this case would be to allow the cross-examination that R.V. sought to conduct.

[84] The probative value of the proposed line of questioning was not only extremely high, it was critical to a fair trial in the circumstances of this case. While there is no fixed rule, evidence offered in an attempt to rebut the kind of claim the Crown made in this case is the paradigm example of where sexual experience evidence is apt to be so important that it is likely to be admissible. An accused person, met with the allegation that the complainant's pregnancy confirms his crime because he is the only person who could have caused that pregnancy, has a compelling claim to be permitted to confront that allegation by cross-examining

the complainant. That compelling claim rests solidly in the right to make full answer and defence, and in the interests of justice in a fair process and a just determination.

[85] Moreover, the probative value of the proposed cross-examination in the case does not depend on discriminatory beliefs or biases. And, contrary to the views expressed by the application judge, this was not a case where the evidence "would seem more likely to distort the truth seeking process at the trial than to further it." This was a judge alone trial where the trial judge would presumably understand the proper use to which the cross-examination evidence could be put. Trial judges would also be in a position, through legal training and judicial experience, to caution themselves to avoid the risks of discriminatory beliefs or biases.

[86] However, there is weight on the other side of the scale as well. I do not agree with R.V. that the cross-examination would not significantly intrude on the dignity or privacy of the complainant. The prejudice to the personal dignity and privacy rights of complainants whenever they are cross-examined in an effort to show that they had other sexual experiences is not to be discounted. Such prejudice is real, particularly for someone as young as this complainant. Whenever this kind of questioning is permitted, there is a risk that other complainants will be discouraged.

[87] Still, the risk of prejudice to both the complainant and the larger administration of justice in this case does not substantially outweigh the significant

probative value of the proposed cross-examination. The urgency of vetting the Crown's paternity allegation during trial was simply too great, and there was nothing in the circumstances of this case to diminish it. Meanwhile, the prejudice to the administration of justice of permitting the cross-examination, although real, was not intense enough to overcome that need. The proposed cross-examination had to be permitted under s. 276, and the application judge erred in failing to do so.

(4) Did this error cause a substantial wrong or miscarriage of justice?

[88] Despite the application judge's ruling, counsel for R.V. managed to suggest to the complainant that she was not a virgin when the alleged sexual assault occurred. He did so under the guise of cross-examining her about her claimed virginity. This question violated the application judge's ruling and should not have been asked.

[89] The complainant also provided extensive evidence, both in her evidence in-chief and during cross-examination, about her understanding of virginity, the physiology and function of the hymen, and what intercourse entails.

[90] The Crown relies upon all of this testimony to suggest that R.V. effectively managed to conduct the cross-examination he sought. It says that even if the application judge erred in her ruling, no miscarriage of justice occurred.

[91] I disagree. While counsel for R.V. did skirt the ruling by indirectly suggesting to the complainant that she was not a virgin when the alleged sexual assault occurred, he was not able to probe her answer, or ask her about any particular sexual experiences she may have had that were capable of impregnating her during the relevant period. What occurred was not a fair substitute for the cross-examination that should have been allowed. In my view, a substantial wrong or miscarriage of justice occurred.

B. DID THE S. 669.2 TRIAL JUDGE ERR IN HOLDING THAT THE APPLICATION JUDGE'S S. 276 RULING WAS BINDING ON HIM?

[92] After the application judge was unable to continue, R.V. immediately renewed his s. 276 application before the s. 669.2 trial judge. The application document R.V. filed was the same, and none of the supporting facts had changed.

[93] The trial judge refused to re-open the s. 276 ruling. He said, "My finding is the ruling […] on the 276 application shall stand and the defence is not entitled to re-litigate it." He offered alternative reasons for his decision.

[94] His main reason for refusing to entertain the application was that s. 669.2 does not confer discretion on a s. 669.2 trial judge to permit re-litigation of matters settled by the judge who was unable to continue. He expressed his conclusion on the effect of s. 669.2 as follows: "I find that [the application judge's] section 276 ruling […] is binding, and the matter will not be re-heard."

[95] He said, in the alternative:

> In any event, even if I had the discretion to re-hear the 276 application, I would decline to do so. The application was fully argued and dismissed at a time that was several months before the issue that gave rise to the [application judge's departure] arose. The material filed on the 276 application now is the same as it was before [the application judge]. The evidence is the same, the arguments would be the same, and there is no change in circumstances that might prompt a re-hearing.

[96] I take no issue with the trial judge's alternative ruling. In my view, however, his conclusion that the application judge's decision was binding on him was wrong in law.

[97] It is unnecessary in coming to this conclusion to revisit the entirety of the clear and impressive statutory construction analysis undertaken by the trial judge. The jurisdiction of a s. 669.2 trial judge to reconsider prior rulings derives not from s. 669.2, but from that judge's status as the trial judge. When a judge becomes seized of a matter under s. 669.2, he becomes the trial judge for all purposes. Since he continues the trial as the trial judge, the s. 669.2 trial judge is given the same authority that the replaced trial judge had. As such, he has the same power to reconsider prior rulings made within that trial by the replaced trial judge, when it is in the interests of justice to do so.

[98] The power of a trial judge to reconsider earlier rulings made within the trial they are presiding over is clear. The relevant principles are as follow.

[99] The principles of *res judicata* do not apply during a hearing to decisions reached by a judge during that hearing, and a judge is not *functus officio* when a *voir dire* has ended: *R. v. Farrah (D.)*, 2011 MBCA 49, 268 Man. R. (2d) 112, at paras. 22-23. As Sopinka J. affirmed in *R. v. Adams*, [1995] 4 S.C.R. 707, at para. 29, judges who are not *functus officio* have jurisdiction to reconsider and vary the orders that are made within a trial, in the interests of justice. Justice Sopinka said, at para. 30:

> As a general rule, any order relating to the conduct of a trial can be varied or revoked if the circumstances that were present at the time the order was made have materially changed. In order to be material, the change must relate to a matter that justified the making of the order in the first place.

See also: *R. v. Calder*, [1996] 1 S.C.R. 660, at para. 21; *R. v. La*, [1997] 2 S.C.R. 680, at para. 28; *R. v. Morin* (1997), 143 D.L.R. (4th) 54 (Ont. C.A.), 32 O.R. (3d) 265, at p. 60; and *R. v. H.B.*, 2016 ONCA 953, 345 C.C.C. (3d) 206, at para. 51.

[100] Indeed, this court has held that a trial judge can change their mind up until the point when the accused has been sentenced: *R. v. Lessard* (1976), 30 C.C.C. (2d) 70 (Ont. C.A.).

[101] There are, of course, limits on the authority to reconsider. It should not be used without circumspection because of the interest in finality and clarity. Nor can reconsideration produce unfairness: *R. v. Montoute*, [1991] A.J. No. 74 (C.A.), 62

C.C.C. (3d) 481, at p. 488.[2] For example, it may not be appropriate to reconsider rulings that have been relied upon by one of the parties in forming a trial strategy, unless the prejudice incurred in reliance on the ruling can be remedied: *R. v. Underwood*, [1998] 1 S.C.R. 77; *R. v. MacDonald* (2000), 49 O.R. (3d) 417 (C.A.) *per curiam*; and *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at paras. 99-104.

[102] The most common circumstance where it may be in the interests of justice to reconsider rulings is where facts have materially changed: *Adams*, at para. 30; *La*, at para. 28; *R. v. Savojipour* (2006), 79 O.R. (3d) 418 (C.A.), 205 C.C.C. (3d) 533, at para. 15 *per curiam*; and *R. v. Le*, 2011 MBCA 83, 270 Man. R. (2d) 82, at para. 123, leave to appeal refused [2011] S.C.C.A. No. 526.

[103] However, this is not the only circumstance. Rulings have also been reopened where a party has misunderstood the scope of an admission, or because counsel was unaware of relevant evidence at the time: see the discussions summarized in *R. v. I.C.*, 2010 ONSC 32, 249 C.C.C. (3d) 510, at paras. 151-63. A trial judge may also correct a decision that they discover was made in error: *R. v. Morgan*, [1983] A.J. No. 742 (Q.B.), at paras. 12 and 15; *R. v. Williams*, 2013 ONSC 3100, 300 C.C.C. (3d) 240; *Setak Computer Services Corporation Ltd. v.*

---

[2] *Montoute* was overruled on the separate issue of its interpretation of s. 8 of the *Charter* following *R. v. Edwards*, [1996] 1 S.C.R. 128 and *R. v. Alcantara*, 2015 ABCA 259, 606 A.R. 313, at para. 217.

Burroughs Business Machines Ltd. et al. (1977), 76 D.L.R. (3d) 641 (Ont. Sup. Ct.), 15 O.R. (2d) 750, at p. 644.

[104] It would make no sense, in my view, for s. 669.2 trial judges to be unable to respond in these ways in the interests of justice because they are bound by decisions of the judge they have replaced.

[105] In my view, s. 669.2 does not impel such a conclusion. It is true that s. 669.2 does not contain an express reconsideration power similar to the one found in s. 653.1 relating to mistrials. The primary function of s. 653.1, however, is to create a new rule that enables pre-trial rulings that have been made in a mistried case to apply at the new trial. This new rule was adopted in the interests of efficiency, to preserve prior rulings where it is reasonable to do so. Having provided for the continued application of pre-trial rulings, the section goes on to make clear that the inherent power of trial judges to reconsider earlier decisions that I have described above has not been removed. Section 653.1 provides:

> In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the *Canadian Charter of Rights and Freedoms* that were made during the trial are binding on the parties in any new trial if the rulings are made – or could have been made – before the stage at which the evidence on the merits is presented.

[106] Simply put, the inclusion in s. 653.1 of a discretionary power to reconsider does not signal the exclusion of a power to reconsider for trial judges acting under the authority of s. 669.2.

[107] Nor does reconsideration by the trial judge of a decision made in the same proceeding or trial by another judge constitute an impermissible collateral attack on the earlier decision: *R. v. Litchfield*, [1993] 4 S.C.R. 333, at pp. 349-50; and *R. v. Allen* (1996), 110 C.C.C. (3d) 331 (Ont. C.A.), at pp. 343-44 *per* Doherty J.A.

[108] In my view, the trial judge therefore erred in concluding that, as a s. 669.2 judge, he was bound by the application judge's s. 276 decision.

[109] Ordinarily this error would not matter because the trial judge's alternative, discretionary basis for refusing reconsideration was sound. At the time of the renewed s. 276 application there had been no change of circumstances or other reason to revisit the prior ruling.

[110] Yet circumstances did later change in two material ways. When this occurred, defence counsel did not ask to have the s. 276 ruling re-opened. This is understandable. The trial judge's ruling that he was bound by the application judge's s. 276 decision as a function of s. 669.2 made any such request futile. In my view, a lawyer faced with the trial judge's ruling that they lack jurisdiction cannot fairly be expected to ask the trial judge to act *ultra vires* because of a change in factual circumstances. Thus I am persuaded that the trial judge's error resulted in

a substantial wrong or miscarriage of justice by foreclosing subsequent requests for reconsideration on the s. 276 decision in circumstances where reconsideration was due.

[111] The material change of circumstances that featured most centrally in the parties' submissions related to the estimated gestational age of the foetus on September 18, 2013 – being 13 weeks and 5 days.

[112] It is evident that during the s. 276 hearing, both defence counsel and the application judge proceeded on the misunderstanding that the gestational age was calculated from the date of conception, in this case producing a conception date of June 14, 2013, give or take 5 to 7 days. Since the alleged offence occurred on July 1, 2013, the estimated gestational age of the foetus erroneously appeared to be exculpatory.

[113] Indeed, the application judge relied on the misunderstood exculpatory potential of this information as providing R.V. with a sufficient, alternative way to challenge the Crown's paternity theory, without having to engage in a sexual experience cross-examination:

> But this [challenge] can be accomplished in two ways. First, the gestational age of the foetus on September 18th, 2013 was estimated at 13 weeks, 5 days. This may not accord with the date of the alleged offence.

[114] However, when Dr. Montgomery testified at trial, she explained that the gestational age of the foetus is actually calculated from the estimated date of the last menstrual period, and not from the date of conception. She further testified that the date of conception is usually 14 days after the date of the last menstrual period, give or take 5 to 7 days. In the complainant's case, this meant that she was likely to have become pregnant on or about June 28, 2013. Meanwhile, the sexual assault was alleged to have occurred on July 1, 2013. The gestational age evidence therefore was actually incriminating – not exculpatory. Indeed, the trial judge relied upon the gestational age evidence in convicting R.V. because "this evidence squarely puts the time of conception, with as much precision as possible, at or about the time [the complainant] alleged the sexual assault occurred."

[115] In the result, one of the palliatives relied upon by the application judge for denying the s. 276 cross-examination application, was undercut during trial. This, in my view, was a material change in circumstance that warranted the trial judge's reconsideration of the earlier ruling.

[116] There was another change in circumstance that arose when Dr. Montgomery testified. The materiality of this change was driven home with the complainant's evidence relating to her sexual experience with her boyfriend.

[117] There was no indication during the s. 276 application that the Crown intended to lead evidence about the complainant's sexual experience with her

boyfriend at trial. Its position was that, while it could not establish actual penetration by R.V. during the alleged sexual assault, the testimony of the complainant that she was a virgin when she was allegedly sexually assaulted, coupled with the nature of the sexual assault, supported the Crown's theory that R.V. impregnated her and that the pregnancy confirmed the sexual assault.

[118] Yet during trial, evidence about the complainant's sexual experience on September 2, 2013 was presented by the Crown, first by Dr. Montgomery and then by the complainant. Dr. Montgomery explained how the pregnancy could not have occurred during the "first ever sexual experience, or sexual active, sexual intercourse […] on the 2nd of September", as described by the complainant.

[119] The complainant then provided evidence about this September 2, 2013 sexual experience during the Crown's examination-in-chief. The Crown asked her what she understood sexual intercourse to mean. She described intercourse and testified that it would cause pain and spotting for some women. He then asked her, "Okay. And so, when you indicate that you're asked that prior to September 2nd, were you of the view that you had sexual intercourse prior to that?" The complainant answered without linking her answer to the testimony she had just given about pain and spotting. The trial Crown then asked again, "Was it your understanding if you had, based on the situation you had?" She replied, "I had told [Dr. Montgomery] I wasn't sure if it had happened or not on July 1st, but that I had

hoped, and that I had thought it didn't, because of the spottings and pain I was in on September 2nd."

[120] Unequivocally, this was testimony drawn by the Crown from the complainant about sexual activity on an occasion other than the alleged offence.

[121] I do not think I am being unfair in suggesting that the Crown was seeking this testimony about her subsequent spotting and pain during sexual intercourse with her boyfriend in an effort to explain how the complainant persisted in her belief that she was still a virgin despite her pregnancy. Regardless of whether that is so, the fact that the Crown presented other sexual experience evidence as part of its case is material in a s. 276 application. The Crown's readiness to lead such evidence is relevant in weighing the prejudice that would be caused by defence questioning about prior sexual experiences, and could properly have invited an application to reopen the earlier s. 276 ruling.

[122] In my view, the trial judge's erroneous conclusion that he was bound by the application judge's s. 276 ruling mattered. It had the effect of rendering future meritorious applications to reconsider futile. In my opinion, this is enough to require that R.V.'s conviction be set aside.

CONCLUSION

[123] I would allow the appeal for the reasons provided, set aside R.V.'s convictions, and order a new trial.

Released: June 13, 2018 ("D.W.")

"David M. Paciocco J.A."
"I agree. J. MacFarland J.A."
"I agree. David Watt J.A.