

# SUPREME COURT OF YUKON

Citation: *HMTK v DLD*  
2024 YKSC 47

Date: 20240514  
S.C. No. 22-01516  
Registry: Whitehorse

BETWEEN

HIS MAJESTY THE KING

AND

D.L.D.

**Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.**

Before Justice K. Wenckebach

Counsel for the Crown

Neil Thomson

Counsel for the Defence

Malcolm Campbell

**This decision was delivered in the form of Oral Reasons on May 14, 2024. The Reasons have since been edited for publication without changing the substance.**

## REASONS FOR DECISION

[1] WENCKEBACH, J. (Oral): The defendant, D.L.D., is charged with one count of sexual assault. He has brought an application pursuant to s. 276 of the *Criminal Code*, RSC, 1985, c C-46 ("*Criminal Code*"), to admit evidence about the complainant's previous sexual activity.

[2] According to D.L.D.'s affidavit that was filed in support of this application, the complainant is D.L.D.'s acquaintance. D.L.D., the complainant, and others were socializing at the complainant's house. The complainant alleges that at some point in

the evening D.L.D. went into her bedroom when she was in bed asleep and sexually assaulted her. D.L.D. seeks to admit evidence that he and the complainant had consensual sexual activity earlier in the day when he, the complainant, and a few others went to the store to get snacks. The sexual activity occurred in the car, outside the convenience store, and involved kissing and fondling.

[3] The Crown opposes D.L.D.'s application. I will therefore set out the requirements of s. 276, then apply them to the case at bar.

[4] There are two stages in a s. 276 application. This application is at the first stage. At the first stage, the defendant must provide written notice containing detailed particulars of the evidence the defendant seeks to adduce and the relevance of that evidence to an issue at trial. The Court must then determine whether the evidence the defendant seeks to admit is capable of being admissible under s. 276(2) of the *Criminal Code*. The threshold for meeting this element of the test is low. The defendant must establish facial relevance, and any doubts about admissibility should be resolved at the second stage.

[5] Turning to the application of the law to the application before me, D.L.D. has provided sufficient notice of the application. The particulars D.L.D. provides is about the other sexual activity he will be testifying to. He states that he seeks to admit the evidence of the other sexual activity to demonstrate that the complainant confused the occurrence of sexual activity earlier in the day with what she alleges occurred in the evening. Alternatively, she may have regretted the other sexual activity because she was in a relationship with someone at the time.

[6] In support of this position, D.L.D. attests that the complainant consumed significant amounts of drugs and alcohol during the evening. He furthermore attests that the complainant said in her statement to the police that she drank alcohol until 6 a.m. that day.

[7] D.L.D. also attests he has reviewed the complainant's police statements, when she stated that D.L.D. was lying on top of her with his pants off and her pants pulled down, that he had his fingers in her vagina, and that he had unzipped the complainant's hoodie and exposed her breasts. In the second statement, the complainant states that D.L.D. was standing over her with his pants down, masturbating himself. She said that D.L.D. was trying to take her pants off, but that there was no penetration.

[8] In both statements, the complainant states that her brother was sleeping beside her, woke up, and saw D.L.D. running out of the room, holding up his pants. D.L.D. also reviewed a statement provided by the complainant's brother. In the statement, the brother said that he did not think there was anyone else in the room when he woke up to the complainant yelling about being sexually assaulted.

[9] D.L.D. submits that the evidence from the complainant herself shows that the complainant was confused about what happened in the night in question. The sexual activity in the car provides a further basis for understanding the complainant's confusion. It therefore supports his anticipated defence that D.L.D. and the complainant have no sexual activity in the complainant's bedroom that night as alleged.

[10] In setting out the notice, then, D.L.D. has provided particulars of the evidence he seeks to adduce as well as its relevant to the issue of whether the alleged sexual activity occurred.

[11] The next question is whether the evidence of the other sexual activity is capable of being admissible at trial.

[12] The Crown submits that D.L.D.'s position that the complainant may have confused the sexual activity in the car with the alleged sexual assault has no air of reality. The evidence is therefore not relevant. The Crown states that D.L.D. provides nothing more than a bare assertion that the sexual activity in the car could be confused with the allegations of the sexual assault. Given that the sexual activity in the car occurred in a different location, time, and in a different context than the alleged sexual assault, D.L.D. would need expert evidence showing that the complainant could have been confused in this way to be able to raise this argument.

[13] I find, however, that D.L.D. has provided a basis for arguing that the complainant is confused about the events of the evening. Her two descriptions of the alleged sexual assault are quite inconsistent, and her statement that D.L.D. was in the bedroom seems inconsistent with her brother's observations. Based on her own statement, the complainant had a significant amount to drink, which could have explained why she was confused. In that context, D.L.D.'s evidence goes some way to explaining why the complainant's confusion would have expressed itself such that the complainant would have alleged a sexual assault in the bedroom.

[14] I conclude that the evidence is facially relevant and therefore may be admissible at trial. This is sufficient to meet the requirements of the first stage of the s. 276 test. The application will therefore proceed to the second stage.