

# SUPREME COURT OF YUKON

Citation: *R. v. Field*, 2010 YKSC 11

Date: 20100322  
Docket S.C. No.: 09-01508  
Registry: Whitehorse

BETWEEN:

**HER MAJESTY THE QUEEN**

AND:

**BILLY EDWARD FIELD**

Before: Mr. Justice L.F. Gower

**Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.**

Appearances:

Peter Chisholm

and Jennifer Grandy

Malcolm Campbell

and Kimberly Hawkins

Counsel for the Crown

Counsel for the Defence

## **RULING ON APPLICATION UNDER SECTION 276 DELIVERED FROM THE BENCH**

[1] GOWER J. (Oral): There is an application before me under s. 276 regarding the intention of the defence to adduce evidence of the prior relationship between the accused and the complainant, which at times, I am told, included consensual sexual relations.

[2] Essentially, defence and Crown counsel have managed to agree on the result that this form of evidence is admissible for the purpose of establishing context between

the parties and so that the jury is not misled into thinking that what happened on October 25, 2008 was a meeting between strangers. Because counsel have effectively agreed on the type of evidence which can be led and how far defence counsel can go in eliciting that evidence, I am satisfied under s. 276.1(4) that the evidence sought to be adduced is capable of being admissible, and, in effect, I am ruling on the application that the *voir dire* should flow as a result of that finding.

[3] I have the evidence of the accused in the form of an affidavit before me. The Crown has not sought to cross-examine the accused on that affidavit because, essentially, the Crown and the accused are on common ground. I am, however, required under s. 276.2(3) and (4) to provide reasons and, out of an abundance of caution, I am doing so.

[4] Crown counsel has referred to the evidence as being similar to that which was the case in *R. v. Strickland*, [2007] O.J. No. 517. In particular, I adopt what the Court said in that case at paras. 31 through 35 as being applicable here:

“31. While such evidence is logically probative on the issue of consent, it is not strongly probative. Saying that the complainant is more likely to consent to having sex with a person with whom she has an established sexual relationship than if no such relationship existed at all, is a long way from saying that such evidence could ever prove consent. Clearly it could not. The determination of consent is a subjective approach which is only concerned with the complainant's perspective. The inference of an increased likelihood of consent flowing from the existence of an ongoing sexual relationship is only one background piece of circumstantial evidence against which the jury would assess the conflicting direct evidence as to whether she did or did not consent. It is an open question whether or not such evidence meets the threshold of "significant" probative value demanded by s. 276(2)(c).

32. However, such evidence has, in my view, significant evidentiary value as context - context that serves to prevent the jury from embarking on areas of enquiry that would distort the fact-finding process as they consider the issue of consent.

33. I postulated above a general rule that people don't normally have sex with strangers, but are typically involved in a relationship. Juries know this rule. Hence, a jury will be looking for a relationship between the parties to add credence to the evidence of an accused that the complainant consented to sex on the night in question. Absent evidence of an existing relationship, a jury might well ask: why would the complainant suddenly agree to have sex with a virtual stranger? Where is the relationship between these parties? What happened between the two of them on that single night that makes it probable that they would end up consensually in bed together by the end of it?

34. If the accused is prevented from putting the existence of an ongoing sexual relationship between himself and the complainant into evidence, the trier of fact might well assume that none existed and that the accused and the complainant were little more than strangers. This misapprehension has the potential to make the evidence of the accused appear inherently improbable, and could result in his evidence being rejected for a reason that does not, in fact, exist.

35. The probative value of this contextual evidence is not to support the inference of an increased likelihood of consent. Rather, it is to dispel the inference of the unlikelihood of consent, which would result if the jury were left with the misapprehension that the sexual relations in question must have occurred on the sudden, with no pre-existing relationship between the parties."

[5] Therefore, the principal factors under s. 276(3) which I find have affected my determination here are the interests of justice, including the right of the accused to make full answer and defence, and whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case.

[6] Counsel have submitted that there will be evidence led of these previous sexual encounters which periodically were arranged by either the complainant or the accused, that there will be no unnecessary probing of the complainant's sexual history for embarrassing details, and that the same restriction will apply to any additional independent evidence led by the accused.

[7] For all of those reasons, I am content that defence counsel should be allowed to adduce the evidence sought.

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GOWER J.