

**IN THE COURT OF APPEAL OF MANITOBA**

*Coram:* Chief Justice Richard J. Chartier  
Mr. Justice Michel A. Monnin  
Madam Justice Diana M. Cameron

***BETWEEN:***

<b><i>HER MAJESTY THE QUEEN</i></b>	)	<b><i>Z. M. Jones</i></b>
	)	<i>for the Appellant</i>
	)	
	)	
<i>Respondent</i>	)	
	)	
	)	<b><i>R. N. Malaviya and</i></b>
<i>- and -</i>	)	<b><i>P. G. Benham</i></b>
	)	<i>for the Respondent</i>
<b><i>ELOI ROMAN JOSEPH CATELLIER</i></b>	)	
	)	
	)	<i>Appeal heard and</i>
<i>(Accused) Appellant</i>	)	<i>Decision pronounced:</i>
	)	<b><i>October 17, 2018</i></b>

**NOTICE OF RESTRICTION ON PUBLICATION:** No person shall publish in any document, or broadcast or transmit in any way, the contents of an application made under section 276.1; the evidence taken and the representations made that will result in the publication of the name or identity of the complainant (see section 276.3 of the *Criminal Code*).

**NOTICE OF RESTRICTION ON PUBLICATION:** No one may publish, broadcast or transmit any information that could disclose the identity of the complainant(s) or witness(es) (see section 486.4 of the *Criminal Code*).

**CAMERON JA** (for the Court):

[1] The accused appeals his convictions, after trial by jury, for the offences of sexual assault, assault and utter threats. His sole ground of appeal is that the trial judge erred in dismissing his application, made pursuant to section 276 of the *Criminal Code* (the *Code*), to cross-examine the complainant regarding her prior sexual activity.

[2] While section 276.5 of the *Code* deems a determination pursuant to section 276.2 to be a question of law, which is therefore reviewable on a standard of correctness, deference is afforded to the trial judge's determinations of relevance as well as prejudicial versus probative values (see *R v Darrach*, 2000 SCC 46 at para 71; and *R v MT*, 2012 ONCA 511 at para 54).

[3] The accused argues that the evidence regarding the complainant's sexual activity was necessary to impeach her credibility, give context to their relationship, to establish an honest but mistaken belief in consent and to prove that the complainant had a motive to fabricate.

[4] We disagree. In her reasons, the trial judge correctly stated and applied the legal principles. She was keenly aware that this case turned entirely on credibility. She allowed the accused to cross-examine the complainant on some of her sexual history, but not on others. Key to her decision for denying the accused to cross-examine the complainant in certain areas was that the complainant's sexual history would not have realistically advanced the accused's defence on motive or on honest but mistaken belief. Moreover, she found that such evidence was "nothing more than an attempt to serve the prohibited inferences as regards the twin myths" that the complainant would be more likely to have consented to the alleged sexual assault and that she would be less credible as a witness by virtue of her prior sexual experience.

[5] In the end, we are not persuaded that the trial judge erred. She carefully considered each of the factors as required by section 276(3) of the *Code*. She gave reasons for dismissing each of the accused's requests. She

was alive to the issue of the accused's ability to make full answer and defence while, at the same time, balancing it with the complainant's privacy and dignity, as well as the danger of prejudice to the proper administration of justice. Appellate intervention is unwarranted.

[6] As a result, the appeal is dismissed.

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Cameron JA

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Chartier CJM

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Monnin JA