Citation: R v S (D), 2022 MBCA 94
Date: 20221205
Docket: AR20-30-09539

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Freda M. Steel
Madam Justice Janice L. leMaistre
Madam Justice Karen I. Simonsen

***B E T W E E N*:**

HIS MAJESTY THE KING	)	***J. D. Poettcker***
	)	*for the Appellant*
Respondent	)	
	)	***M. S. Bright***
- and -	)	*for the Respondent*
	)	
D. S.	)	*Appeal heard:*
	)	***June 6, 2022***
(Accused) Appellant	)	
	)	*Judgment delivered:*
	)	***December 5, 2022***

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On appeal from 2020 MBQB 163

SIMONSEN JA

[1] The accused appeals his conviction for sexual interference against his 14-year-old stepdaughter (the victim) and the nine-year term of imprisonment that was imposed as a sentence.

[2] The grounds of appeal on conviction are that the trial judge erred in relying on evidence of the victim that was neither credible nor reliable; and in finding that the injuries to the victim observed after the alleged offence were

caused by the accused, in light of the plausible alternative explanations for those injuries.

[3] The conviction appeal raises issues regarding the admissibility of evidence of a complainant's "sexual activity other than the sexual activity that forms the subject-matter of the charge" under section 276 of the *Criminal Code* (the *Code*), in relation to the victim's chlamydia diagnosis.

[4] As part of the Crown's disclosure, but not tendered as evidence at trial, was a medical report of Dr. Stacey Bynkoski, detailing an examination of the victim conducted shortly after the alleged assault. The medical report indicated that, as part of the examination, the victim had been tested for chlamydia and that test had returned a positive result.

[5] The accused argues that, at the trial, the trial judge erred in law by denying the request of his counsel (trial counsel) (different than counsel on appeal) to "re-open" his pretrial application under section 276 to seek to ask the victim (and other witnesses) about her chlamydia diagnosis, and by prohibiting trial counsel from questioning the victim about that diagnosis. The accused says that exploration of this line of questioning would have impacted the trial judge's assessment of the victim's credibility and afforded other plausible explanations for her observed injures and reported symptoms after the alleged assault.

[6] In support of his conviction appeal, the accused seeks to introduce fresh evidence to demonstrate that the trial judge's error rendered the trial unfair resulting in a miscarriage of justice, and to demonstrate the impact of his error on the verdict. The accused also says that, independent of judicial

error, the fresh evidence should be admitted, in the interests of justice, to challenge the reliability of the verdict.

[7] The Crown says that the trial judge correctly disallowed questioning about the victim's chlamydia in the absence of judicial authorization under section 276—and that he did not preclude trial counsel from reopening or bringing a fresh section 276 application. Rather, trial counsel, when given the opportunity, did not bring a section 276 application to pursue questioning about chlamydia.

[8] On the sentence appeal, the accused asserts that the trial judge failed to properly consider his *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688) and his extreme intoxication at the time of the offence, and he says that the sentence imposed is demonstrably unfit. The Crown maintains that there was no error in principle as the sentence imposed took into account all of the relevant factors, and that the trial judge's weighing of those factors is entitled to deference. The Crown further says that the sentence reflects the accused's high degree of moral culpability and is not unfit.

The Conviction Appeal

The Evidence at Trial

[9] At the trial, the victim's video-recorded police statement was admitted under section 715.1 of the *Code* and she testified, as did Ashley Smith, a sexual assault nurse examiner, and Dr. Bynkoski, an expert in the identification of genital injuries to children and how they heal over time.

[10] The victim's evidence was that, on May 5, 2018, she was at the residence of her mother and the accused, babysitting her three younger

brothers. She testified that, after the accused returned home from a night of drinking with her mother, he forced vaginal intercourse, anal intercourse, oral sex and digital penetration on her. She estimated the duration of the sexual assault as being between two and three hours. She described the accused using enough force with his penis and fingers to cause vaginal bleeding. The accused then threatened to kill her family if she did not keep what he had done a secret.

[11] Following the sexual assault, the victim walked to the next door neighbour's house and requested a ride to her aunt's home, where she disclosed what had happened. She was then taken to the hospital where a sexual assault protocol examination was conducted by Ms Smith. After attending at the hospital, the victim went to the police station where she provided her video-recorded statement. In that statement, she explained that, in the immediate aftermath of the assault, she had pain when urinating and when seated.

[12] On the sexual assault protocol examination, Ms Smith noted a .5 centimetre laceration at the opening of the victim's vagina and three lacerations, measuring .5, .25 and .25 centimetres, near her anus. No sign of bleeding from these injuries was noted. Ms Smith also observed bruising to the victim's hymen. The internal portion of the examination could not be completed because it was too painful for the victim.

[13] Dr. Bynkoski testified that, because the vaginal area, as well as the rectum and anus, are highly vascularized, she thought the injuries in those areas that had been observed by Ms Smith would have healed quickly. Dr. Bynkoski opined that those injuries were "hours to days old" and, more specifically, would have been less than three weeks old.

[14] The defence called no evidence.

[15] In convicting the accused, the trial judge found the victim to be a credible and reliable witness. He determined that "the evidence of the injuries to the genitals and the rectal area of the [victim were] strongly corroborative of the series of sexual assaults she described." He was satisfied that the Crown had proven the accused's guilt beyond a reasonable doubt.

Section 276

[16] A consideration of the principles set out in section 276 of the *Code* (reproduced in the attached appendix) is central to addressing the issues raised on this appeal.

[17] The fundamental purposes of section 276 are protecting the integrity of a trial by excluding irrelevant and misleading evidence, protecting the accused's right to a fair trial, and encouraging the reporting of sexual offences by protecting the security and privacy of complainants (see *R v Barton*, 2019 SCC 33 at para 74; see also *R v Goldfinch*, 2019 SCC 38 at paras 28-38; *R v RV*, 2019 SCC 41 at paras 32-46; and *R v JJ*, 2022 SCC 28).

[18] Section 276(1) provides that evidence of sexual activity of a complainant other than that which is the subject of a charge is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is (1) more likely to have consented to the sexual activity that forms the subject-matter of the charge, or (2) less worthy of belief. These twin myths are prohibited by the *Code* as a matter of social policy and "false logic" (*Barton* at para 60). However, to protect the presumption of innocence, evidence may be admitted, on application, for other relevant purposes, but must satisfy the criteria set out in section 276(2), considering the factors in

section 276(3), to ensure that it does not undermine the integrity of the trial or the complainant's dignity and privacy.

[19] Even if the proffered evidence is not being adduced in support of the twin myths, and is relevant to an issue at trial and is of specific instances of sexual activity (see sections 276(2)(a)-276(2)(c)), it will not be admissible unless it "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice" (at section 276(2)(d)), paying careful attention to the factors listed in section 276(3) (see *RV* at para 60).

[20] The *Code* prescribes a formal process for making an application under section 276. Sections 278.93 and 278.94 (also reproduced in the attached appendix) set out the requirements. A written application must be filed. If, upon considering that application, a judge is satisfied that it was made in the proper form and that other technical requirements are met, and that the evidence sought to be adduced is capable of being admissible under section 276(2) (the first stage, section 278.93), the judge shall hold a hearing to determine whether the evidence is admissible (the second stage, section 278.94). For the hearing, the complainant may appear and make submissions, and must be advised of their right to be represented by counsel. At the conclusion of the hearing, the judge shall determine whether the evidence or part of it is admissible and provide reasons for that determination.

[21] A section 276 application should generally be brought prior to trial (see *Goldfinch* at para 145; and *JJ* at paras 85-86). Such an application can be reopened and a judge can hold a new hearing to reconsider the admissibility of prior sexual activity evidence (see *Barton* at para 65). As a general rule, an order related to the conduct of trial, including the admission of evidence,

may be varied or revoked if there is a material change of circumstances (see *RV* at para 74).

[22] Ultimately, responsibility for enforcing compliance with the section 276 regime "lies squarely" with the trial judge (*Barton* at para 68; see also *RV* at para 71).

The Pretrial Background

[23] The pretrial background provides important context for understanding what occurred at trial.

[24] Many months prior to the trial, the Crown produced to trial counsel, as part of its disclosure, reports of Dr. Bynkoski. Those reports noted the injuries observed by Ms Smith at the hospital after the alleged sexual assault and also indicated that, at that hospital attendance, samples were taken from the victim, the results of which indicated that she had tested positive for chlamydia on a urine NAAT test. In addition (as indicated by the Crown at the appeal hearing), in one of Dr. Bynkoski's reports, she opined as to the age of the injuries observed by Ms Smith, consistent with the opinion that she gave at trial.

[25] At the preliminary inquiry, the victim twice testified that she was a "virgin" at the time of the alleged incident. In her police statement, she also stated that, during the sexual assault, she had told the accused "this is my first time, I don't know what this all means".

[26] After the preliminary inquiry and prior to the trial, trial counsel made an application under section 276 to cross-examine the victim on "her prior sexual history covering a span of 30 days prior to the date of the offence

alleged in the indictment". The position taken by the accused on the application was that he wanted to cross-examine the victim with respect to her sexual activity in the 30 days prior to the offence date in order to explore whether she had engaged in other sexual activity that, within the timeframe identified by Dr. Bynkoski, could have caused the observed injuries.

[27] Application briefs were submitted by both the accused and counsel appointed to represent the victim.

[28] The accused's brief identified that the victim had been diagnosed with chlamydia following the alleged sexual assault, and stated that that contradicted evidence she had given at the preliminary inquiry that she was a virgin. Nonetheless, the accused's fundamental argument, set out in his brief in support of the line of questioning sought, was that the victim's chlamydia infection provided evidence that she was sexually active prior to the alleged assault and, thus, she may have received the injuries from other sexual activity prior to the offence date. The brief indicated that the presence of the chlamydia infection revealed that the proposed cross-examination was "not a fishing expedition."

[29] In the victim's brief, she essentially agreed that the accused could cross-examine her as to whether she had engaged in any sexual activity in the 20 days prior to May 5, 2018. The victim's brief also stated that it was her understanding "that the Crown did not intend to rely on the fact that [she] tested positive for [c]hlamydia in order to prove any of the charges." The brief further argued that the accused should not be permitted to question the victim regarding the chlamydia diagnosis, as there was no evidence upon which to base the allegation that the presence of chlamydia supported a finding that she had engaged in sexual activity prior to the offence date.

[30] The section 276 application was addressed in court prior to trial by way of a consent order. Counsel advised the trial judge that they had agreed to an order which provided that trial counsel was permitted to ask the victim whether she had engaged in sexual activity within a 20-day period before May 5, 2018, and, if she responded that she had, to inquire as to the details. If the answer was "no", that was to be the end of the matter. The trial judge, in endorsing the order, recognized the requirement, prescribed by the *Code,* that he give reasons for his decision; he provided brief oral reasons.

The Discussion at Trial About Chlamydia and Section 276

[31] The focus of this appeal is on what happened at trial when, on cross-examination of the victim, trial counsel asked her about chlamydia.

[32] During her cross-examination, the victim was asked the question permitted by the pretrial consent order made under section 276, and she denied having had any sexual activity in the 20 days prior to the offence date.

[33] Then, at the end of the cross-examination, trial counsel asked her whether, when she was examined in the hospital following the alleged sexual assault, blood and other samples were taken and she was then referred to a doctor and ended up being treated for chlamydia. Crown counsel objected on the basis that the question gave rise to section 276 issues. The trial judge questioned why this had not been included as part of the section 276 application that had been brought prior to the trial.

[34] Trial counsel stated that he understood that the Crown would be calling Dr. Bynkoski as a witness at trial and tendering her report, which contained the information about the chlamydia. Crown counsel responded

that he did not intend to file her report or to ask her questions about the victim's diagnosis. The trial judge said, "So then it's not relevant, is it".

[35] There was then the following exchange:

> . . .
> THE COURT: So it's -- it's not an issue, as far as I'm concerned. I don't know how you can ask that without a [section] 276 application, unless you want to renew your application now.
>
> [TRIAL COUNSEL]: Yes, I believe that's what may be appropriate then.
>
> THE COURT: I wonder if we're going to finish this trial on time now if we're going to do -- if we're going to do another [section] 276 application.
>
> [CROWN COUNSEL]: I guess, my concern is -- I mean, the medical reports were disclosed. It was an initially alleged in the - - I know my friend did seek this in his -- in his application under the [section] 276, in his brief. Ultimately there was an agreement to limit the scope - -
>
> THE COURT: Right.
>
> [CROWN COUNSEL]: -- of the [section] 276.
>
> THE COURT: Right. This isn't a surprise to you that if it was in the disclosure.
>
> [TRIAL COUNSEL]: I'm not saying that it wasn't disclosed. My understanding was that the Crown's evidence was going to include the medical report of Dr. Bynkoski, which included the fact that she was diagnosed with chlamydia, the [victim].
>
> THE COURT: Okay, well, you ...
>
> [TRIAL COUNSEL]: So my --
>
> THE COURT: What --

> [TRIAL COUNSEL]: -- understanding, I want to -- if you look at the materials that were filed, it was about the injuries she received, not about whether or not that she had been diagnosed.
>
> THE COURT: But isn't that -- isn't that [section] 276 information through the back door? Like, aren't you trying to get to prior sexual history now?
>
> [TRIAL COUNSEL]: Well, the --
>
> THE COURT: Like, this is one of the impermissible references.
>
> [TRIAL COUNSEL]: I submit not. It's not -- it has nothing to do with compliance, nothing to do with the twin myths. It's a medical condition Dr. Bynkoski made, I'd suggest otherwise, in terms of the disease could be transmitted.
> . . .

[36] Crown counsel then reiterated that he did not intend to ask Dr. Bynkoski about chlamydia or how the disease could be transmitted, pointing to the victim's brief on the section 276 application, which indicated that the Crown did not intend to rely on the victim's chlamydia diagnosis in order to prove its case. Crown counsel said that this was a basis upon which to distinguish *RV*, which was relied upon by the accused. (In *RV*, the Crown relied on evidence of the complainant's virginity and pregnancy to help prove the sexual assault).

[37] The trial judge agreed that *RV* was distinguishable and concluded the discussion by saying:

> . . .
> . . . No, I -- I think this is [section] 276 through the back door. I'm not going to allow it. So bring the witness back in, please.
>
> I'll add this though, if the Crown does lead chlamydia evidence, or it does somehow come into the record through anything the Crown does, or the Crown -- or a Crown witness might do, then

> I'll hear from you again on that point. We might have to recall the witness then.
> . . .

The Standard of Review

[38] A determination as to the admissibility of other sexual activity evidence is a question of law, reviewable for correctness (see the *Code* at section 278.97; *Goldfinch* at para 24; and *R v Delmas,* 2020 ABCA 152 at para 6).

Analysis

[39] The accused asserts that the trial judge erred by not allowing him to "re-open" or bring a section 276 application to ask about the victim's chlamydia diagnosis. He also argues, in the alternative, that the trial judge erred by, effectively, dismissing such an application.

[40] Preliminarily, I must consider whether a question to a complainant, by an accused, about a chlamydia diagnosis and treatment seeks to adduce evidence "that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge". The parties have essentially proceeded with this appeal on the basis that it does, and I agree.

[41] As stated by Karakatsanis J, writing for the majority in *Goldfinch*, "evidence . . . that implies sexual activity clearly engages s[ection] 276(1)" (at para 42).

[42] McLachlin J (as she then was), writing for the majority in *R v Seaboyer; R v Gayme*, [1991] 2 SCR 577 (*Seaboyer*) suggested that the

presence of disease has the capacity to implicate a person's sexual history (at p 614):

> . . .
> . . . Evidence of sexual activity excluded by s. 276 may be relevant to explain the physical conditions on which the Crown relies to establish intercourse or the use of force, such as semen, pregnancy, injury or disease—evidence which may go to consent . . ..
> . . .

[43] Furthermore, this Court has recognized that chlamydia is a sexually transmitted disease. In *R v Mabior* (*CL*), 2010 MBCA 93, rev'd in part on other grounds, 2012 SCC 47, this Court indicated that "the accused was tested for a number of sexually transmitted diseases" (at para 94), and then noted his diagnosis with gonorrhea and contact with someone who had chlamydia (*ibid*).

[44] I am satisfied that evidence of chlamydia implies sexual activity and, thus, engages section 276(1).

[45] The accused argues that the trial judge erred by denying his request to renew his section 276 application or ask any questions about chlamydia for the four stated reasons given by the trial judge: (1) the evidence was going to be used for an impermissible inference prohibited by section 276, (2) the application would take too much time, (3) the Crown was not relying on the diagnosis to prove the offence as it did in the case of *RV*, and (4) trial counsel was trying to get section 276 information "through the back door".

[46] The accused seeks to tender trial counsel's affidavit as fresh evidence, in part, to assist this Court in determining what happened at the trial and, thereby, support his position that the trial judge adopted an unfair

process. Trial counsel swears: "My understanding after the exchange between the Judge and I was that my request to renew my [section] 276 Application had been denied" and "Given the response from Judge, I saw no need to file another [section] 276 Application because I thought the issue was functus."

[47] When considering fresh evidence directed at the fairness of the trial process, a court, in determining whether it is in "the interests of justice" under section 683(1)(d) of the *Code* to admit the evidence, is to "conduct 'an examination of the grounds of appeal raised, the material tendered and the remedy sought' which may include 'material extraneous to the trial record' so long as it is relevant to the issue" (*R v Richard* (*DR*) *et al*, 2013 MBCA 105 at para 204). Applying this test, in my view, it is not in the interests of justice to admit trial counsel's affidavit for the purpose of determining what occurred at the trial. That assessment can be made on the basis of the record of proceedings. Fresh evidence will not be admitted where there is adequate evidence in the record to address the issues on appeal (see *R v Flett*, 2015 MBCA 59 at para 9).

[48] Based on my review of the record, I would conclude that, although the trial judge could have been clearer, he did not preclude trial counsel from bringing a renewed or fresh application or indicate that, with a proper evidentiary foundation, it would be futile to do so. He twice mentioned that what trial counsel was trying to do was tender section 276 information "through the back door", and he raised with him the possibility of bringing a section 276 application.

[49] Even if trial counsel had attempted to frame his approach as a renewal of the pretrial application, the scope of that application was quite

different and narrower than what he apparently sought to explore at trial. The pretrial application sought only to ask the victim whether she had had sexual contact in the 30 days prior to the offence date, and did not seek to ask about chlamydia. Trial counsel seemed to acknowledge as much when, during the discussions at trial, he confirmed that the purpose of the pretrial application was not about diagnosis but addressed the injuries sustained.

[50] The record also clearly reveals that no fresh section 276 application was brought at the trial. The *Code* prescribes, and the authorities emphasize, that such an application be brought in writing, with specific technical requirements met. These procedural requirements ensure that the Crown and the complainant are not taken by surprise and that the court is equipped to meaningfully engage in a section 276 analysis (see *R v Darrach*, 2000 SCC 46 at para 55; *R v AJB*, 2007 MBCA 95 at paras 50-51; *R v Wright*, 2012 ABCA 306 at paras 8, 10; *RR c R*, 2013 QCCA 1790 at paras 77-79; *Barton* at paras 62, 82-83; *Goldfinch* at para 55; and *RV* at para 48).

[51] Moreover, no evidentiary foundation was laid, or any argument advanced, as to section 276 requirements other than that trial counsel thought the diagnosis of chlamydia would be before the court as the Crown would be tendering Dr. Bynkoski's report—despite the victim's brief on the pretrial section 276 application having indicated that the Crown would not be relying on her chlamydia diagnosis. It seems that trial counsel may have been proceeding on the basis that no section 276 application was required when he stated that the medical condition of chlamydia had "nothing to do with the twin myths."

[52] In summary, the trial judge did not err. The questioning sought engaged section 276, as the trial judge properly identified. He gave trial

counsel an opportunity to bring a section 276 application, but trial counsel did not do so.

[53] That being said, two matters warrant further comment. First, when the trial judge approved the section 276 consent order prior to trial, he correctly identified that he had an obligation to provide reasons, even where there was agreement. However, and although not argued on the appeal, it is difficult to see how the trial judge's very limited reasons complied with the requirement in section 278.94(4)(c) to "state the manner in which [the] evidence is expected to be relevant to an issue at trial." His reasons were limited to a repetition of the terms of the consent order and a conclusory statement that the questions consented to were reasonable and did not violate the impermissible inferences. In *Goldfinch*, Karakatsanis J commented on the link between the procedural requirements within the section 276 regime, including the need for a judge's reasons, and the requirement that evidence of other sexual activity be relevant (see para 55). It is important that judges be mindful of the specific statutory requirements for reasons set out in section 278.94(4).

[54] Even if the trial judge erred in failing to provide the extent of reasons required, I am satisfied that the curative proviso in section 686(1)(b)(iii) of the *Code* would apply. There would be no substantial wrong or miscarriage of justice as the error would be trivial or harmless, particularly given that the victim, the accused and the Crown all consented to the order allowing trial counsel to ask the questions sought, with only an abridgement from 30 to 20 days (see *R v Van*, 2009 SCC 22 at para 35).

[55] Also worthy of comment is the fact that it is not clear whether, at the trial, the trial judge or the lawyers appreciated that, if a section 276

application was required for trial counsel to seek to elicit the evidence of chlamydia, so too would it have been incumbent on the Crown to seek judicial permission to tender that evidence. The common law principles articulated in *Seaboyer* speak to the general admissibility of prior sexual activity evidence and, given the associated dangers, trial judges are to "follow [the] guidance in *Seaboyer* to determine the admissibility of Crown-led prior sexual activity evidence in a *voir dire"* (*Barton* at para 80).

The Fresh Evidence Motion

[56] Although the accused focussed on tendering the fresh evidence to demonstrate the impact of the trial judge's alleged error, he also argues that it should be admitted, even in the absence of judicial error, to challenge the reliability of the verdict. The proffered fresh evidence is:

(1) report of Dr. Bynkoski, dated May 29, 2018, redacted, which contains the results of the victim's chlamydia urine test taken a few hours after the alleged assault;

(2) Cadham Provincial Laboratory report (the Cadham report) which confirms that the accused attended for a chlamydia test in December 2018 and tested negative; and

(3) curriculum vitae and report of Dr. Pierre J. Plourde, an infectious disease expert, dated October 14, 2021, which addresses a number of questions about how chlamydia is transmitted and whether any of the victim's symptoms and injuries could be attributed to a chlamydia infection.

[57] The well-known criteria for an appellate court to consider, in determining whether it is in the interests of justice under section 683(1)(d) to admit fresh evidence directed at the reliability of the verdict, were set out in *Palmer v The Queen*, [1980] 1 SCR 759 (at p 775):

> . . .
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v The Queen*, [1964] SCR 484.
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
> . . .

[58] Implicit in the consideration of the *Palmer* criteria is that the fresh evidence in question be admissible; if the law of evidence would not otherwise permit the introduction of the evidence at trial, it cannot be admitted on appeal by way of a fresh evidence motion (see *The Queen v O'Brien*, [1978] 1 SCR 591 at 602; and *R v Roussin* (*B*), 2014 MBCA 24 at paras 17-18).

[59] There is case law regarding the issue of whether evidence of a complainant's other sexual history, sought to be tendered with an appellate court as fresh evidence, must be shown to be admissible according to the regime and procedures set out in sections 276, 278.93 and 278.94 of the *Code*.

[60] Two recent appellate decisions, *R v SCC*, 2022 YKCA 2 and *R v Davies*, 2022 BCCA 103, with which I agree, have addressed this issue. In both, Bennett JA, recognizing that section 276(1) bars the introduction of evidence of a complainant's sexual history in "proceedings" if that evidence supports the twin myths, held that the substantive purpose of section 276 is not limited to the trial process and that it applies, to a certain degree, to fresh evidence motions on appeal. Specifically, she concluded that, where fresh evidence of other sexual activity of a complainant is sought to be adduced on appeal, the procedural provisions of section 278.93 (the first stage) should be complied with. The court of appeal should determine, under section 278.93(4), whether the evidence sought to be adduced is "capable of being admissible" in accordance with section 276(2). But the appellate court should generally not go on to hold a hearing under section 278.94 to determine whether the evidence is admissible (the second stage) (see *SCC* at para 30; and *Davies* at paras 38-41).

[61] The decisions in *SCC* and *Davies* further explain that, if a court determines that the evidence of other sexual activity of a complainant is "capable of being admissible" according to section 276(2), and it otherwise meets the *Palmer* criteria for the admission of fresh evidence, then it would be admitted for the purpose of the appeal, and a new trial would be ordered. It would be the responsibility of the new trial judge to hold the section 278.94 hearing and decide if the evidence will be admitted in the new trial (the second stage) (see *Davies* at paras 34).

[62] Turning to the fresh evidence in the present appeal, the procedural provisions of section 278.93(2) and 278.93(4) appear to have been substantially met by the fresh evidence motion. However, one of the

procedural requirements of section 278.93 is that the hearing be held *in camera* (see section 278.93(3)). No such request was made in this case and the fresh evidence motion was not heard in that manner. Future motions before this Court for the admission of fresh evidence that engages section 276 should be conducted *in camera*, in order to protect the dignity and privacy of the complainant.

[63] As for the substantive provisions of sections 276(2) and 276(3), the Cadham report regarding the accused's negative chlamydia test result is not evidence of the victim's other sexual activity so does not engage those sections. Nor is that report subject to any exclusionary rule. Nonetheless, its relevance, and, thus, admissibility, is not established given that Dr. Plourde's report notes that it is difficult to draw any conclusions from a negative chlamydia test done seven months after the incident, as the infection could have cleared in that time period, either spontaneously or by treatment with antibiotics. As well, he opines that one would not expect a positive result for chlamydia on a urine PCR test (NAAT) until at least one week after being infected.

[64] To the extent that the reports of Drs. Bynkoski and Plourde relate to the victim's chlamydia diagnosis, admissibility must be considered through the lens of section 276, specifically, the first stage of a section 276 application prescribed by section 278.93.

[65] As outlined earlier, section 276 requires that, in order to admit evidence that a complainant has engaged in sexual activity other than that which is the subject of the offence, the evidence must not be adduced for the purpose of supporting an inference based on the twin myths, must be relevant to an issue at trial and of specific instances of sexual activity, and must have

significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[66] The accused submits that the chlamydia evidence does not support an inference based on the twin myths, and says that it was relevant to issues at trial for two purposes: it directly contradicts the victim's prior sworn statement that she was a virgin, thereby affecting her credibility; and it provides an alternate explanation for her reported symptoms and observed injuries after the alleged assault.

[67] On the question of credibility, the accused relies on *R v SL*, 2018 ABQB 889, where the Court permitted the complainant to be questioned about her diagnosis for a sexually transmitted disease one week after an alleged assault, in order to challenge her credibility. The Court determined that this line of questioning would allow the accused to call evidence that he did not suffer from the disease in order to impugn the complainant's statements to her mother and the police that she was not sexually active.

[68] Although care must be taken when an applicant asserts that sexual history evidence will be relevant to a complainant's credibility (see *Goldfinch* at para 51), it is clear that "[i]f evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted" (*Darrach* at para 35). As further stated in *Darrach*, such evidence was admissible in the case of *R v Crosby*, [1995] 2 SCR 912 "because it was inextricably linked to a prior inconsistent statement that was relevant to the complainant's credibility" (at para 36).

[69] At the first stage of the section 276 analysis, a judge is to conduct only a facial consideration and make a tentative decision, and any doubts that

exist at that stage ought to be resolved at the second stage (see *R v Ecker* (1995), 96 CCC (3d) 161 at 181-82 (Sask CA); *R v LeBrocq*, 2011 ONCA 405 at para 8; and *R v Cortes Rivera*, 2020 ABCA 76 at para 16). Given the low threshold test at the first stage, the chlamydia evidence in this case could be relevant to the issue of the victim's credibility. As chlamydia is a sexually transmitted disease, its presence indicates that the victim has been sexually active, which then puts her previously sworn claim of "virginity" into question.

[70] The purported relevance of the chlamydia evidence to the issue of the victim's symptoms and injuries is less compelling. Although Dr. Plourde indicates that some of the symptoms which the victim reported—abdominal, genital, rectal burning/pain—"could conceivably" be explained by a pre-existing acute or longstanding chlamydia infection, the issue at trial was not simply that the victim had symptoms of genital burning and rectal pain. Rather, the fact relied upon by the trial judge was the documented laceration injuries and bruising to the victim's hymen. The accused presented no evidence that chlamydia could cause those injuries.

[71] For the reasons outlined, the reports of Drs. Bynkoski and Plourde are likely relevant to an issue at trial, at least on the question of the victim's credibility. Thus, those reports could pass the relevance threshold of section 276(2)(b).

[72] Regarding whether the evidence could qualify as specific instances of sexual activity under section 276(2)(c), in *RV*, Karakatsanis J, again writing for the majority, stated that "the words 'specific instances of sexual activity' must be read purposively and contextually" (at para 48). In *RV*, it was determined that questioning the complainant about other sexual activity that

could have caused her pregnancy qualified as "specific instances of sexual activity". Likewise, questions about chlamydia could implicate specific sexual activity capable of causing chlamydia.

[73] The probative value/danger of prejudice factor contained in section 276(2)(d) involves a balancing which "requires judges to pay careful attention to the factors listed in section 276(3) in assessing the potential impact of the evidence on the accused, the complainant and the administration of justice" (*RV* at para 60).

[74] In the present case, as I will later explain, it is not clear that questioning the victim about chlamydia would be highly probative, even as it relates to her credibility. Nonetheless, as this is a factor that requires weighing, and the appellate case law suggests only a facial consideration at the first stage, I will assume that the evidence is "capable of being admissible" (the *Code* at section 278.93(4)) and will consider the test set out in *Palmer*.

[75] With respect to the *Palmer* criteria, there is no issue that the reports of Drs. Bynkoski and Plourde are credible. I will not address relevance beyond what I have already done in my section 276 analysis.

[76] In *R v Zanolli*, 2018 MBCA 66, Hamilton JA, for this Court, summarized the general view of the due diligence criterion, stating (at para 38):

> The first criterion of "due diligence" . . . is an "important factor to be considered in the totality of the circumstances" (*R v Hay*, 2013 SCC 61 at para 64), but it "should not trump the other *Palmer* criteria" (*R v JAA*, 2011 SCC 17 at paras 8, 26). Its purpose is to ensure finality and order in the criminal process (see *Hay* at para 64). Also see *R v WRB*, 2010 MBCA 116 at para 4. However, a failure to meet the due diligence criterion should not "override

> accomplishing a just result" (*R v Warsing*, [1998] 3 SCR 579 at para 56). Therefore, while important, the due diligence criterion is not a prerequisite to the admission of fresh evidence.

[77] The accused relies on the affidavit of trial counsel to support his position on due diligence. As noted earlier, trial counsel says that he believed there was no need to file another section 276 application regarding chlamydia because he understood that the trial judge had denied his request to do so. While trial counsel may have genuinely held this belief, I have already concluded, based on a review of the court record, that that is not what occurred at the trial.

[78] Not only should a section 276 application generally be brought prior to trial, it would still have been possible to do so mid-trial in this case—with requests for a brief adjournment and an abridged notice period. In all of the circumstances, due diligence concerns are raised. Nonetheless, the requirement for due diligence is attenuated in a criminal case; it is not to override accomplishing a just result.

[79] On the final *Palmer* criterion, I am not persuaded that the chlamydia evidence could reasonably be expected to have affected the result.

[80] The accused argues that the evidence of chlamydia would have so compromised the victim's credibility as to affect the outcome of the trial. He says that this is particularly so given that the victim lied to the police when she said that her mother had not been in the bedroom when the assault began.

[81] The accused's argument assumes that the victim would have given the same evidence at trial regarding her virginity as she did at the preliminary inquiry—and assumes that her definition of "virgin" is based on vaginal

sexual intercourse. No evidence was given as to what this term meant to her. With respect to the victim's comment in her police statement about this being her first time, that was expressed as something she had said to the accused during the assault, not necessarily as a fact. Indeed, in that statement, in response to a question as to whether anything like this had ever happened before, she said "like it was only once, but that was not from him, it was from someone else."

[82] In any event, Dr. Plourde states that chlamydia can be contracted through "sexual contact with the penis, vagina, mouth or anus of an infected partner." Thus, the evidence that the victim had chlamydia does not necessarily reveal a "clear contradiction" or "blatant lie" about her not having previously had vaginal intercourse, as argued by the accused.

[83] Moreover, if the victim had agreed at trial that she previously lied about being a virgin, this evidence would simply have affected her credibility on a collateral issue—a collateral issue of intense privacy, especially to a 15-year-old girl. As stated by Karakatsanis J in *RV*, "Inquiries into any individual's sexual history are highly intrusive. The threat to the complainant's dignity and privacy is even higher when the proposed questions surround the conduct of a 15-year-old" (at para 68).

[84] Finally, it is difficult to see how collateral evidence as to the victim "lying about being a virgin" could reasonably be expected to have affected the verdict. The trial judge found that the victim was unshaken, during an extensive cross-examination, on her key allegations against the accused. He recognized inconsistencies in her evidence, but nonetheless accepted it. He reasonably accepted her explanation for having lied to the police about her mother's whereabouts, namely that she did not want her three younger

brothers to be placed in foster care. The trial judge also found that the injuries to the victim's genitals and rectal area strongly corroborated her description of the incident.

[85] This brings me to the impact of the proposed fresh evidence on the victim's reported symptoms and observed injuries. In my view, even if relevant, the fresh evidence could not reasonably have affected the outcome of the trial on this basis.

[86] The victim described post-assault symptoms that it was painful to urinate and to sit. Dr. Plourde notes that some of these symptoms could have resulted from an acute or long-standing chlamydia infection. However, he added that these symptoms could have been caused by trauma to the genitals and anal canal—and that, if none of the symptoms predated the alleged sexual assault, "then it is more likely that they were caused by sexual contact a few hours prior to the examination." There was no evidence that the victim suffered from these symptoms prior to the assault. In fact, she testified, on cross-examination, that they had not been present before. When asked whether she was able to urinate properly before May 5, 2018, she said that it was "normal". When asked if she could not sit right prior to the alleged assault, she said, "Oh, no. I was fine, completely fine." In any event, the trial judge did not rely on these symptoms in convicting the accused—it was the injuries that he found to be corroborative.

[87] With respect to the diagnosis of chlamydia undermining the victim's evidence that she did not have sexual relations in the three weeks prior to the sexual assault and supporting an inference that her injuries were caused by having sexual activity with someone else in that period, the diagnosis is not, in my view, significantly probative. The victim testified, unchallenged, that

her symptoms came on right after the assault and there was no evidence that she suffered from any injuries or symptoms previously.

[88] Finally, as for chlamydia being an alternative explanation for the victim's injuries noted by the nurse, Dr. Plourde's report does not attribute those injuries to chlamydia. He states, "The genital bleeding was most likely caused by the noted lacerations and could not have been attributed to a chlamydia infection, but were more likely a result of genital trauma from sexual contact."

[89] Therefore, considering the criteria in *Palmer*, I am not persuaded that it is in the interests of justice to admit the fresh evidence.

[90] For the foregoing reasons, I would deny the fresh evidence motion and dismiss the conviction appeal.

<u>The Sentence Appeal</u>

[91] At the sentencing, the Crown sought a sentence of 10 years' imprisonment, whereas the accused suggested that a four-to-five year custodial term was appropriate.

[92] The trial judge, in imposing a sentence of nine years, considered the principles applicable to sentencing for sexual offences against children as set out in *R v Friesen*, 2020 SCC 9, stating (at para 41):

> In ***Friesen***, the Supreme Court also instructs sentencing judges to consider both the wrongfulness and harmfulness of sexual offences against children in determining proportionality (at para. 75). This requires sentencing judges to weigh the gravity of the offence through the consideration of three factors: (1) the inherent wrongfulness of the offences; (2) the potential harm; and (3) the actual harm (at para. 76).

[93] The trial judge recognized that *Friesen* "call[ed] for a culture shift in how sentencing judges are to approach the sentencing of offenders who sexually abuse children" (at para 39) and that "[s]exual violence causes additional harm to children by damaging their relationships with their families and caregivers" (at para 45, citing *Friesen* at para 60).

[94] The trial judge found the accused's degree of moral culpability to be high, given his awareness of the inherent wrongfulness and the harmfulness of his actions. Although the victim was too distraught to make a victim impact statement, the trial judge noted the short term harm to her given the "immediate distress and pain caused by a physically violent sexual assault, [and] also the long-term emotional harm caused through the destruction of her bonds to immediate and extended family members" (at para 60).

[95] The standard of review applicable to a sentencing decision is highly deferential. Appellate intervention is only justified where the judge made an error in principle that has a material impact on the sentence or where the sentence is demonstrably unfit. A material error includes an error in principle, a failure to consider a relevant factor or an erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle only if, by emphasizing one factor or by not giving enough weight to another, the judge exercises their discretion unreasonably (see *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 49, 51; and *Friesen* at para 26).

[96] The accused argues that the trial judge erred by failing to give reasonable weight to his significant *Gladue* factors and his degree of intoxication.

[97] The evidence does not support the accused's contention that he was so intoxicated as to affect his "moral blameworthiness and [his] ability . . . to have foresight about the short term and long-term harms he would cause". Despite the fact that the accused displayed signs of intoxication, he sexually assaulted the victim over the course of hours, even after her two young brothers interrupted what was happening. Afterward, the accused threatened to murder the victim's family if she told anyone what he had done. The trial judge reasonably held that this was indicative of the accused's full awareness of the seriousness and wrongfulness of his actions.

[98] Regarding *Gladue*, the trial judge noted, as a general principle, that "it has been recognized that in some cases, the seriousness of an offence may outweigh what would otherwise constitute mitigating factors under a *Gladue* analysis and this may result in little if any impact on the overall sentence" (at para 35). However, in connection with the particular case before him, the trial judge conducted a thorough review of the accused's background and found that his *Gladue* factors attenuated his moral culpability. The trial judge stated (at paras 70, 73):

> It is hard for me to imagine a case in which the ***Gladue*** factors, which demand my attention, could be featured more prominently in the life experience of an Indigenous offender than this one. The high degree of inter-generational dysfunction demonstrated in the family life of the accused can fairly be linked to colonialism and systemic racism directed against Indigenous people in our country.
>
> I have every confidence in finding on these facts that the systemic and background factors described in ***Gladue*** were and continue to be at play in the life of the accused. This finding has a direct bearing on the moral blameworthiness on the accused that I will address again later in these reasons.

[99] In light of these comments, the accused has not demonstrated that the trial judge erred in principle by failing to give reasonable weight to his *Gladue* factors.

[100] The accused also says that this was a single-instance offence fuelled by the consumption of alcohol—and that, in all of the circumstances, the sentence was harsh and excessive.

[101] In imposing the sentence, the trial judge took into account not only the accused's *Gladue* factors and that he has support from his family, but also: the statutory requirement to place primary emphasis on denunciation and deterrence as a result of the victim being a child; the significant harm to the victim, which included physical injuries and the impact on her family relationships; the inherent wrongfulness and harmfulness of this "brutally violent and unprotected" sexual assault (at para 81(iii)); the position of trust; the threat; and the accused's prior criminal record, which contained multiple convictions for violent offences, including robbery and uttering threats.

[102] Furthermore, the victim was an Indigenous girl. Young girls, especially those who belong to marginalized groups, are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people, who experience childhood sexual violence at a disproportionate level (see *Friesen* at paras 68-70). Section 718.04 of the *Code*, as well as the common law before that section came into force, provide that a sentence for an offence that involves the abuse of a person who is vulnerable because of circumstances—including because the person is Indigenous and female—also require that primary consideration be given to the objectives of denunciation and deterrence (see *R v Alcorn*, 2021 MBCA 101 at para 60; and *R v Bunn*, 2022 MBCA 34 at paras 98-110).

[103] Ultimately, in my view, the sentence imposed was high, but not to the level of being demonstrably unfit. This conclusion does not necessarily reflect an endorsement of the sentence, but rather a recognition and application of the deferential standard of review.

Conclusion

[104] For the foregoing reasons, I would deny the fresh evidence motion and dismiss the conviction appeal. While I would grant leave to appeal the sentence, I would dismiss the sentence appeal.

Simonsen JA

I agree: Steel JA

I agree: leMaistre JA

APPENDIX

Criminal Code (at sections 276, 278.93-278.94):

Evidence of complainant's sexual activity
276(1) In proceedings in respect of an offence under section 151, 152, 153, 153.1 or 155, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant

(a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or

(b) is less worthy of belief.

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

(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.

Factors that judge must consider
(3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account

(a) the interests of justice, including the right of the accused to make a full answer and defence;

(b) society's interest in encouraging the reporting of sexual assault offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

Application for hearing—sections 276 and 278.92
278.93(1) Application may be made to the judge, provincial court judge or justice by or on behalf of the accused for a hearing under section 278.94 to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Form and content of application
(2) An application referred to in subsection (1) must be made in writing, setting out detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial, and a copy of the application must be given to the prosecutor and to the clerk of the court.

Jury and public excluded
(3) The judge, provincial court judge or justice shall consider the application with the jury and the public excluded.

Judge may decide to hold hearing
(4) If the judge, provincial court judge or justice is satisfied that the application was made in accordance with subsection (2), that a copy of the application was given to the prosecutor and to the clerk of the court at least seven days previously, or any shorter interval that the judge, provincial court judge or justice may allow in the interests of justice and that the evidence sought to be adduced is capable of being admissible under subsection 276(2), the judge, provincial court judge or justice shall grant the application and hold a hearing under section 278.94 to determine whether the evidence is admissible under subsection 276(2) or 278.92(2).

Hearing—jury and public excluded
278.94(1) The jury and the public shall be excluded from a hearing to determine whether evidence is admissible under subsection 276(2) or 278.92(2).

Complainant and compellable
2) The complainant is not a compellable witness at the hearing but may appear and make submissions.

Right to counsel
(3) The judge shall, as soon as feasible, inform the complainant who participates in the hearing of their right to be represented by counsel.

Judge's determination and reasons
(4) At the conclusion of the hearing, the judge, provincial court judge or justice shall determine whether the evidence, or any part of it, is admissible under subsection 276(2) or 278.92(2) and shall provide reasons for that determination, and

> **(a)** if not all of the evidence is to be admitted, the reasons must state the part of the evidence that is to be admitted;
>
> **(b)** the reasons must state the factors referred to in subsection 276(3) or 278.92(3) that affected the determination; and

(c) if all or any part of the evidence is to be admitted, the reasons must state the manner in which that evidence is expected to be relevant to an issue at trial.

Record of reasons

(5) The reasons provided under subsection (4) shall be entered in the record of the proceedings or, if the proceedings are not recorded, shall be provided in writing.