CITATION:, R. v. Boyle, 2019 ONSC 3641
COURT FILE NO.: 18-RD-19579
DATE: June 11th, 2019

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
HER MAJESTY THE QUEEN Respondent	Meaghan Cunningham and Jason Newbauer
– and – JOSHUA BOYLE Respondent	Lawrence Greenspon, Eric Granger, Ninetta Caparelli
-and-	
CAITLAN COLEMAN Applicant	Ian Carter
-and-	
Women's Legal Education and Action Fund Intervener	Gillian Hnatiw, Julia Wilkes, Zohar Levy Howard Krongold, Meaghan McMahon
-and-	
Criminal Lawyer's Association (Ontario) Intervener	
	HEARD: May 15th, 2019

RULING ON *CERTIORARI* APPLICATION BROUGHT BY COMPLAINANT

LALIBERTE, J.

Introduction

[1] The Respondent Joshua Boyle is charged with nineteen *Criminal Code* offences, four of which revolve around allegations of sexual violence against his former spouse, the Applicant Caitlan Coleman.

[2] The trial was set for eight weeks and commenced on March 25th, 2019 in the Ontario Court of Justice before Justice P. Doody. There were a number of pre-trial evidentiary applications heard in December 2018 and January 2019. It appears that some of these could not be heard before the start of the trial because of the December 13th, 2018 changes to the legislation governing sexual assault trials.

[3] On April 16th, 2019, the trial judge heard a sec. 276(2) *Criminal Code* application brought by the Respondent seeking the admission of the Applicant's extrinsic sexual activity. Justice Doody allowed some of the evidence with limits and released his reasons for doing so on april 17th, 2019.

[4] On the same day, counsel acting for the Applicant on the sec. 276 hearing advised the trial Judge that an application for *certiorari* would be commenced in the Superior Court of Justice to quash his ruling. Such an application was filed on April 25th, 2019.

[5] As provided for under Rule 43.04(5) of the Superior Court of Justice Criminal Proceedings Rules, the bringing of such application resulted in the suspension of the trial before Justice Doody pending this interlocutory proceeding.

[6] The record shows that the trial was set to be completed on May 17th, 2019. By April 17th, 2019, the Court had heard the testimony of seven Crown witnesses. The Applicant had testified over five days. Her cross-examination was interrupted to hear the sec. 276 application brought by Defence.

[7] On May 15th, 2019, the Court heard submissions from the Applicant, Respondent and Crown counsel. On consent, the Court also heard submissions from two Interveners, namely the

Women's Legal Education and Action Fund (LEAF) and the Criminal Lawyers Association of Ontario (CLA).

[8] Through the materials and submissions, the Court was provided with a very wide range of views and perspectives with regard to the issues raised in this application. While a number of distinct issues were raised, the two fundamental questions asked of the Court are as follows:

1. Should the court exercise its discretion to review Justice Doody's ruling by way of *certiorari*?

2. If *certiorari* is available, is there a basis to quash Justice P. Doody's April 17th, 2019 ruling?

1. Should the Court exercise its discretion to review Justice Doody's ruling by way of *certiorari*?

[9] The positions put forth on the question of a complainant's entitlement to bring a *certiorari* application in response to a ruling allowing the admission of extrinsic evidence of sexual activity are at opposite ends of the spectrum.

[10] The Court will briefly summarize these positions.

Applicant

[11] Counsel for the Applicant submits that as a general proposition, *certiorari* in criminal proceedings is available to third parties in a wider range of circumstances than for parties given that third parties have no right of appeal. This translates to third parties having *certiorari* available to review jurisdictional errors and to challenge an error of law on the face of the record. The measure is whether the order has a final and conclusive character vis-à-vis the third party. So that *certiorari* is available if the claimant is a third party and the ruling is final as against this third party.

[12] Since the Applicant is a third party in this trial and Justice Doody's order is final as against her, she is therefore entitled to bring a *certiorari*. Counsel notes that she has no right of appeal at

the conclusion of the trial and in any event, there would be no effective remedy available to her at that point, since the evidence of prior sexual history would already have been introduced.

[13] The Court is reminded of the complainant's *Charter* protected rights under sec. 276.

[14] Counsel submits that there are no reported cases to support the proposition that *certiorari* is not available to third parties in response to evidentiary rulings.

[15] The Court is asked to reject the "floodgates principle" argument as there is no basis to find that there will be an influx of such applications. The suggestion is that we are dealing with a narrow set of circumstances.

LEAF

[16] LEAF submits that there is no question that avenues such as *certiorari* are available to complainants to challenge orders made in the course of sexual offence proceedings where those orders finally determine their rights. An order permitting an accused to adduce evidence of the complainant's prior sexual history is of a "final and conclusive character" vis-à-vis the complainant.

[17] It is argued that the recent amendments to sec. 276 underscore the significance of a complainant in an application to permit the admission of sexual history evidence. These amendments are said to further reflect the importance of balancing the varied interests at play in a criminal trial namely, the rights of the accused, the truth-seeking functions of the Court and the privacy, security and equality interests of a complainant.

[18] LEAF agrees with the Applicant's submission that *certiorari* is available to third parties in criminal matters in a wider range of circumstances than for the parties, given that third parties have no right of appeal. Third parties may seek such remedy where the alleged error is jurisdictional in nature and in respect of an alleged error of law on the face of the record.

[19] It is noted that sec. 276 is centrally concerned with protecting *Charter* rights and, where necessary, reconciling the right of the accused to make full answer and defence with the rights of complainants and others to privacy and equality

CROWN

[20] The Crown agrees with the submission that the Applicants' rights and interests are affected in a final and conclusive way by the trial judge's ruling and therefore, she is entitled to seek *certiorari* to challenge an error of law on the face of the record.

RESPONDENT

[21] The Respondent's position is that this application is without jurisdiction. It is contrary to the Supreme Court of Canada's instructions that interlocutory appeals in criminal matters are exceptional and should be avoided and not become routine. The remedy sought by the Applicant goes beyond those contemplated on *certiorari* for third parties. To permit a non-party to sidetrack a criminal trial in order to review such evidentiary rulings would open the door to routine interlocutory appeals by witnesses in sexual assault prosecutions, which would wreak havoc on the criminal process and would be contrary to the rule against interlocutory appeals in criminal matters.

[22] Counsel submits that since the scope of review on *certiorari* in the recent Supreme Court of Canada decision in *R. v. Awashish* was not third parties, the comments on the scope of *certiorari* of third parties must be taken as obiter.

[23] The following points are raised in support of his position that *certiorari* should not be available to the Applicant in the circumstances of this case:

- It would trivialize the rule against interlocutory appeals in criminal matters
- Significant prejudice would be caused to accused persons and the trial process
- While Parliament has given appearance rights to complainants in such cases, it has not provided any appeal rights
- It would create a significant and unprincipled disparity between how sexual offences are tried in the Ontario Court of Justice and the Superior Court of Justice

- It makes no sense that a non-party would have a right to an interlocutory appeal where the accused person whose liberty is a stake in the same proceeding would have no such right

- Witnesses such as the Applicant already have unprecedented procedural protection in place before evidence of their extrinsic activity can be presented

- Interlocutory appeals of evidentiary rulings in a criminal matter would allow a non-state actor to substantially lengthen criminal prosecutions; this is contrary to the principles set out by the Supreme Court of Canada in *R. v. Jordan* under sec. 11(b) of the *Charter*

CLA

[24] The essence of CLA's position is that a non-party is not entitled to seek *certiorari* of evidentiary rulings. The recent amendments to sec. 276 do not confer a new right of review to complainants.

[25] The use of *certiorari* by a non-party is limited to circumstances where a trial decision has resulted in a final and conclusive disposition of that person's rights. A ruling under sec. 276 does not implicate a witness' substantive rights. Complainants are compellable witnesses and the evidence sought is not privileged. Short of a claim of privilege, *certiorari* does not lie from a ruling requiring a witness to answer questions – even very sensitive questions – in the course of testifying.

[26] Many witnesses are reluctant to participate in criminal litigation, much less have their personal lives probed in cross-examination. However, it is argued that our justice system would cease to function if discovering the truth became subservient to each witness' sensitivities. Discomfort or the fact that the questions relate to deeply private or personal matters does not mean that a witness has a substantive right not to answer those questions, and then to seek review, and then a further appeal, of every disagreeable mid-trial evidentiary ruling.

[27] CLA submits that the same reasoning applies to testimony about sexual matters. Sec. 276 does not confer or where the application is allowed, take away the complainant's substantive

rights. The section simply sets the criteria and creates the process for determining the admissibility of certain kinds of evidence. It does not give a complainant in sexual assault cases a substantive right to claim a form of privilege. While a person's sexual history is private, there is no right to withhold its disclosure.

[28] The fact that the Crown can adduce such extrinsic evidence is indicative that it is not subject to a privilege.

[29] Parliament has not legislated rights of appeal for third parties in criminal proceedings through the recent amendments to sec. 276. The section provides a limited procedural right to take part in the hearing to decide admissibility.

[30] Allowing *certiorari* to complainants in such trials would be contrary to the principle that criminal proceedings should not be unnecessarily interrupted, fragmented or delayed. The result would be that the entire criminal justice system would bear the burden of accommodating this additional delay so that witnesses do not have to bear the discomfort of telling the truth.

[31] CLA concludes by stating that Judges make mistakes and occasionally, these mistakes result in the admission of evidence that ought to be excluded. Even worse than the disclosure of confidential information from a witness whose identity is protected from publication, wrong evidentiary rulings result in miscarriage of justice and wrongful convictions. Yet our system still disfavours interlocutory reviews.

THE LAW

[32] In deciding this issue, the Court must consider and weigh a number of principles including the following:

(a) The general policy is that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own. This policy is the basis of the rule against interlocutory appeals in criminal matters.

- *Mills v. The Queen [1986] 1 S.C.R. 863*

- *R. v. De Sousa [1992] 2 S.C.R. 944*

(b) Resort to the Superior Court for relief during criminal proceedings is generally not seen consistent with the effective and efficient operation of our criminal justice system. Interlocutory applications to challenge rulings can result in delay, the fragmentation of the criminal process, the determination of issues based on an inadequate record and the expenditure of judicial time and effort on issues which may not have arisen had the process been left to run its normal course.

- *R. v. Johnson (1991) 3 O.R. 3d 49*

- *R. v. Codina [2017] O.J. No. 3278*

(c) The decisions of trial judges on procedural, evidentiary and substantive issues within their purview, in short, the management of trial proceedings, is left to the trial judge.

- *R. v. Passera [2017] O.J. No. 1874*

(d) The Ontario Court of Appeal in York (Regional Municipality) v. McGuigan [2018] O.J. No. 6916 defined *certiorari* as follows at paragraph 44:

> "44. At common law, *certiorari* is one of the several extraordinary remedies issued by the Superior Court to superintend the process of courts of limited jurisdiction, ensuring that those courts do exercise their jurisdiction but do not exceed its limits. In more modern times, the extraordinary remedies involve the issuance of orders in lieu of old prerogative writs. These remedies are discretionary. They do not issue as of right."

(e) "Judicial review by way of the old prerogative writs has always been understood to be discretionary. This means that even if the Applicant makes out a case for review on the merits, the reviewing court has an overriding discretion to refuse relief."

- *R. v. Strickland v. Canada (Attorney General) [2015] 2 S.C.R. 713*

- *Bessette v. British Columbia (Attorney General) [2019] S.C.J. No. 31*

(f) The Superior Court should generally decline to grant the remedy where there is an adequate appellate remedy. The circumstances must be such that the interests of justice necessitate the immediate granting of the prerogative remedy by the Superior Court.

- *R. v. Duvivier [1991] O.J. No. 481*

- *R. v. Arcand [2004] O.J. No. 5017*

(g) The availability of *certiorari* to parties (meaning the Crown and Defence) in criminal proceedings is limited to jurisdictional errors by a provincial court judge.

- *R. v. Awashish [2018] S. C. J. No. 45*

(h) *Certiorari* is available to third parties in a wider range of circumstances than for parties, given that third parties have no right of appeal. It is available to review jurisdictional errors as well as errors on the face of the record relating to a decision of a final and conclusive character vis-à-vis the third party.

- *R. v. Awashish, op. cit.*

(i) Examples of third party *certiorari* cases include the following:

- brought by media in response to a publication ban

- *Dagenais v. C.B.C. [1994] 3 S.C.R. 835*

- brought by a Sexual Assault Care Centre in response to the service of subpoenas *duces tecum* commanding the bringing of the complainant's record

- *L.L.A. v. A.B. [1995] 4 S.C.R. 536*

- brought by individual charged with murder in response to a subpoena to testify at the preliminary inquiry of an accused charged separately for the same murder

- *R. v. Primeau [1995] 2 S.C.R. 60*

- *R. v. Jobin [1995] 2 S.C.R. 78*

- brought by defence lawyer in response to Court's refusal to allow him to withdraw as counsel of record

- *R. v. Cunnigham [2010] 1 S.C.R. 331*

- brought by complainant in response to order compelling her to remove a religious veil while testifying

- *R. v..N.S. [2010] O.J. No. 4306*

- brought by the police in response to disclosure orders of records (i.e. DRE, breathalyzer instruments)

- R. v. Awashish [2018] S.C.J. No. 45

- *R. v. Stipo [2019] O.J. No. 28*

- *R. v. Jackson [2014] O.J. No. 1685*

(j) "...*Charter* rights must be examined in a contextual manner to resolve conflicts between them. Therefore, unlike s. 1 balance, where societal interests are sometimes allowed to override *Charter* rights, under s. 7 rights must be defined so that they do not conflict with each other. The rights of full answer and defence, and privacy, must be defined in light of each other, and both must be defined in light of the equality provisions of s. 15."

- R. v. Mills [1999] 3 S.C.R. 668

(k) "The accused's right to make full answer and defence is a core principle of fundamental justice protected by s. 7 of the *Canadian Charter of Rights and Freedoms.* The complainant's or witness' right to privacy is within the ambit of s. 8 of the *Charter*. Both of these rights are "principles of fundamental justice" and are "informed by the equality rights" as defined within s. 15..."

- R. v. L.M. [2014] O.J. No. 4343

(l) "A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."

- Dagenais v. C. B. C., op. cit.

(m) In *R. v. Darrach [2000] 2 S.C.R. 443*, the Supreme Court of Canada upheld the constitutionality of the revised sec. 276 in Bill-49 enacted in 1992. The initial version had been struck down by the Supreme Court in *R. v. Seaboyer [1991] 2 S.C.R. 577*. Justice Gonthier stated the following with regard to the revised version:

> #3...The current version of s. 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved. The complainant's privacy and dignity are protected by a procedure that also vindicates the accused's right to make full answer and defence."

(n) The following excerpts from the Supreme Court of Canada's decision in *R. v. Jordan [2016] 1 S.C.R. 631* reinforces the significance of an accused person's 11(b) right:

> -"1. Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance."
>
> -"2... the Canadian public expects their criminal justice system to bring accused persons to trial expeditiously. As the months following a criminal charge become years, everyone suffers. Accused person remain in a state of

uncertainty, often in pre-trial detention. Victims and their families' who, in many cases, have suffered tragic losses cannot move forward with their lives. And the public, whose interest is served by promptly bringing those charged with criminal offences to trial, is justifiably frustrated by watching years pass before a trial occurs."

- "3. An efficient criminal justice system is therefore of the utmost importance. The ability to provide fair trials within a reasonable time is an indicator of the health and proper functioning of the system itself. The stakes are indisputably high."

- "5. A change of direction is therefore required."

- "19... the right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice...An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole."

- "20. Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial..."

- "114. The new framework makes courts more accountable...Indeed, courts are important players in changing courtroom culture..."

DISCUSSION

[33] The Court is of the view that Justice Doody's sec. 276 ruling should not be reviewed by way of *certiorari* as sought by the Applicant. The Court is exercising its discretion not to do so.

[34] This application raises a number of difficult issues arising from conflicting fundamental rights of an accused person and a complainant in the context of allegations of sexual violence and the use of the complainant's extrinsic sexual activity. The finding of a balance, as instructed by the Supreme Court of Canada in *Dagenais v. C.B.C., op.cit*, "...that fully respects the importance of both sets of rights" is certainly laudable, but is not an easy task.

[35] It is also challenging to harmonize a non-party's expanded recourse to interlocutory relief as reinforced recently by the Supreme Court in *R. v. Awashish, op.cit*, with the long standing principle that criminal proceedings should not be fragmented by interlocutory proceedings which take on a life of their own.

[36] The Court's ruling in this application is not meant to disparage a complainant's fundamental rights and equality in cases of alleged sexual violence. One of the fundamental purpose of sec. 276 is to encourage the reporting of sexual offences by protecting the security and privacy of complainants.

[37] As explained by the Supreme Court of Canada in *R. v. Primeau, op, cit*, one of the main rationale for allowing wider access to interlocutory relief through *certiorari* for non-parties is that they are excluded from the process and have no say with regard to their rights. The Supreme Court stated the following:

> "...a third party, being outside the actual proceedings, cannot apply to the trial judge for relief..."

[38] Fundamental to the Court's decision is the notion that sec. 276 creates a distinct and unique process which allows for the inclusion of the non-party complainant as a full participant on the issue of the admissibility of extrinsic sexual activity. Recent legislative amendments provide that a complainant may appear, make submissions and be represented by counsel at the hearing on this issue.

[39] The history and purpose behind sec. 276 makes it unique and distinct from other non-party issues which may arise in criminal proceedings. It is a comprehensive constitutional framework built on the instructions of the Supreme Court of Canada in *R. v. Seaboyer, op.cit*. As stated in *R. v. Darrach, op.cit*, "...the balance struck in Seaboyer among the interests of justice, the accused and the complainant is preserved in the current legislation...". It maintains a fair and reasonable balance between the competing fundamental rights at play.

[40] Again, as stated in *R. v. Darrach, op.cit.*:

> "...the current version of sec. 276 is carefully crafted to comport with the principles of fundamental justice. It protects the integrity of the judicial process while at the same time respecting the rights of the people involved. The complainant's privacy and dignity are protected by a procedure that also vindicates the accused's right to make full answer and defence".

[41] The balance is maintained by making evidence of the complainant's other sexual activity presumptively inadmissible unless the accused wishing to adduce such evidence meets the fairly high threshold set out by Parliament which includes that the proposed evidence "has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

[42] Sec. 276(3) sets out the factors that the trial judge must balance in deciding whether to admit such evidence. These factors are:

- the interests of justice, including the right of the accused to make a full answer and defence
- society's interest in encouraging the reporting of sexual assault offences
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case
- the need to remove from the fact-finding process any discriminatory belief or bias
- the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury
- the potential prejudice to the complainant's personal dignity and right of privacy
- the right of the complainant and of every individual to personal security and to the full protection and benefit of the law

[43] Therefore, a complainant's rights are found to be protected within the trial proceedings through the sec. 276 framework. It provides a principled and constitutionally sound response to an accused person seeking the admission of presumptively inadmissible evidence of the complainant's other sexual activity. A process in which the complainant can fully participate and seek relief.

[44] The unique and distinct character of sec. 276 in criminal proceedings is found to weigh in favour of the Court not exercising its discretion to review such rulings through interlocutory judicial reviews as in the present matter.

[45] Undoubtedly, there will be cases where the complainant will disagree with the trial judge's ruling and wish to challenge same. While it may be desirable for a complainant to have a remedy in cases where the correctness of the ruling is questioned, the Court is of the view that the most favourable procedure for a complainant in such cases will in turn clash with an accused person's Charter rights. It would certainly not "fully respect the importance of both sets of rights".

[46] The Court must be mindful that a criminal trial is a contest between the accused person and the state. As stated by Justice MacLeod in *R. v. N.K. [2017] O.J. No. 3525* at paragraph 17:

> "17. Unlike a civil proceeding, a criminal trial is not a simple contest of credibility between two parties. While the criminal law increasingly recognizes the need to provide support for victims of crime and in particular to protect the privacy and dignity of victims of sexual crimes, the fact remains that a criminal proceeding is a contest between the state (in the name of the sovereign) and the individual accused. The complainant is not a party to the proceeding but appears in the role of a witness. Canadian criminal procedure remains anchored in the constitutional guarantee of presumption of innocence; a guarantee which exists for the protection of all citizens and not merely the accused before the court."

[47] The most obvious and probable result of interlocutory reviews of sec. 276 rulings is delay which is contrary to an accused person's sec. 11(b) Charter right to be tried within a reasonable time.

[48] Delay in criminal proceedings goes to an accused person's liberty, security and right to a fair trial. Its significance was noted as follows by the Supreme Court of Canada in *R. v. Jordan, op.cit*, at paragraph 20:

> "20. Trials within a reasonable time are an essential part of our criminal justice systems's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person , and a fair trial. Liberty is engaged because a timely trial means an accused person will spend as little as possible held in pre-trial

> custody or living in the community under release conditions. Security of the person is impacted because a long-delayed trial means prolonging the stress, anxiety, and stigma an accused may suffer. Fair trial interests are affected because the longer a trial is delayed, the more likely it is that some accused will be prejudiced in mounting a defence, owing to faded memories, unavailability of witnesses or lost or degraded evidence."

[49] Justice Doody in his April 24th, 2019 comments (a transcript of which was provided to the court) noted that based on available data, the present application could delay the trial before him for more than 36 months if appeals are brought to the Ontario Court of Appeal and ultimately, the Supreme Court of Canada. In noting this, the Court is mindful that the actual delay cannot be predicted with any degree of certainty. But it is clear that the trial has thus far been fragmented and delayed through this application.

[50] The concern with delay in this application is compounded by the fact that the Applicant is not bound to follow the principles and instructions of *R. v. Jordan, op.cit*, which ensures that the parties are acting in a manner that respects the right of the accused to be tried within a reasonable timeframe as noted recently by the Ontario Court of Appeal in *R. v. Tsega [2019] O.J. No. 765*. In that case, the Court spoke to the difficulty of computing and attributing delays caused by extraordinary remedies brought by the Crown and/or defence. The Court stated the following at paragraph 62:

> "62. *Jordan* did not consider the impact of extraordinary remedies and interlocutory appeals from such orders on the determination of whether an accused's s. 11(b) rights have been violated. The post-*Jordan* jurisprudence also offers no clear answers."

[51] The *Jordan* analytical framework for determining whether delay in a given case has violated an accused's s. 11(b) right to be tried within a reasonable time does not provide for the

attribution of delay caused by a non-party bringing an application for extraordinary remedies. The framework is premised on defence and Crown conduct. This creates much uncertainty on such an important Charter right said to be "central to the administration of Canada's system of criminal justice". This uncertainty is supportive of the Court's decision not to exercise its discretion to review the impugned ruling.

[52] The Court is of the view that allowing the Applicant to challenge Justice Doody's ruling by way of an interlocutory application in the middle of the trial would be contrary to the Supreme Court's instruction in *R. v. Dagenais, op.cit*,:

> "72. A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the Charter and when developing the common law. When the protected rights of two individuals come into conflict…Charter principles require a balance to be achieved that fully respects the importance of both sets of rights."

[53] The proposed review would serve to give a complainant's right precedence over an accused person's rights.

[54] Consideration must also be given to the nature of a sec. 276 ruling. Unlike a publication ban, the removal of a religious veil, the disclosure of police records or the removal of counsel, evidence admitted under sec. 276 forms part of the evidentiary record that the trial judge will consider in deciding whether the Crown has proven guilt beyond a reasonable doubt.

[55] The Applicant submits that Justice Doody's order is final vis-à-vis her and that she has no right of appeal at the conclusion of the case. In any event, there would be no effective remedy available to her at that point since the evidence of prior sexual history would already have been introduced.

[56] There is no question that an unchallenged ruling under sec. 276 will result in the introduction of the complainant's other sexual activity at trial. However, this is no different than accused persons subject to pre-trial or mid-trial rulings with no interlocutory relief. Such rulings may go to the person's fundamental Charter rights including:

- the right to life, liberty and security of the person

- the right to be secure against unreasonable search and seizure

- the right not to be arbitrarily detained

[57] These rulings will most often revolve around privacy interests.

[58] A fitting example is the admission of the accused's alleged similar fact evidence of a sexual nature when it is found by the trial Judge to be relevant and that its probative value outweighs its prejudicial effect. The accused may wish to challenge such a ruling. The trial Judge may have erred in law. While the accused's extrinsic sexual activity will be introduced, there is no interlocutory process available to the accused person. The evidence will be introduced and the only recourse is an appeal at the end of the trial.

[59] As already noted in these reasons, the point of all of this is not to deny the importance of a complainant's right to privacy, dignity and equality in matters involving allegations of sexual violence. The Court must recognize that a balance must be achieved in weighing Charter rights. An accused person who is presumed innocent and whose liberty is at stake should not be given lesser rights.

[60] The Court has also considered the fact that there are a number of provisions in the *Criminal Code* available to a trial Judge to protect a complainant's privacy and limit exposure to the public. A common factor to these provisions that the Court must consider is society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process. The Court notes the following provisions:

1. Sec. 486(1): the Court has a discretion to exclude all or any members of the public from the court room for some or all of the proceedings

2. Sec. 486.2(2): the Court may permit a complainant to testify outside the court room or behind a screen or other device

3. Sec. 486.31(1): the Court may order that any information that could identify a witness not be disclosed in the course of the proceedings

4. Sec. 486.4(1): the Court in matters involving sexual offences, may make an order directing that any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way

5. Sec. 278.94(1): the public shall be excluded from a hearing to determine the admissibility of a complainant's other sexual activity

[61] The Court must also be mindful that while a Crown Attorney is not a complainant's lawyer, a sec. 276 ruling may be appealed at the end of the trial by the prosecution if found to be in the public interest to do so.

[62] Finally, the providing of *de facto* interlocutory relief for a complainant appearing before a provincial court and the denial of same in superior court weighs against the court exercising its discretion to review a sec. 276 ruling. There is no rational basis for such a distinction and results in an unprincipled distinction between trials proceeding in provincial courts and superior courts.

[63] For the reasons stated in this ruling, the Court is therefore exercising its discretion not to review Justice Doody's sec. 276 ruling by way of *certiorari*.

2. **If *certiorari* is available, is there a basis to quash Justice Doody's ruling?**

[64] If the Court is wrong on the question of the exercise of its discretion, the Court finds that there is no error of law on the face of the record warranting the quashing of Justice Doody's ruling.

[65] Counsel for the complainant argues that the trial Judge committed an error of law on the face of the record by failing to recognize the dictate from the Supreme Court of Canada in *R. v. Darrach, op.cit.* that evidence of extrinsic sexual activity of the complainant is rarely relevant to support a denial that the sexual activity charged took place. Reference is made to Justice Doherty's comment in *R. v. L.S. [2017] O.J. No. 4586* that such reasoning "makes no sense…". The evidence is therefore not relevant to an issue at trial. It is argued that even if the proposed evidence has some relevance, Justice Doody failed to properly weigh the evidence at the stage of assessing its probative value. The evidence sought to be adduced had only trifling relevance at its highest and cannot meet the threshold of "significant probative value".

[66] The Court is of the view that the trial Judge was correct in finding that the proposed evidence is relevant to an issue at trial.

[67] Relevance is understood to mean the following:

- Relevance is assessed in the context of the entire case and the positions of the parties

R. v. Cloutier [1979] 2 S.C.R. 709

- Evidence does not have to establish or refute a fact in issue to be relevant; there is a big difference between evidence that is relevant and evidence that is determinative

R. v. L.S. [2017] O.J. No. 4586

- Evidence is relevant where it has some tendency as a matter of logic and human experience to make that proposition for which it is advanced more likely than that proposition would appear to be in the absence of the evidence.

R. v. White [2011] 1 S.C.R. 433

R. v. Candir [2009] O.J. No. 5485

[68] The Crown's position in this trial is that the Applicant was sexually assaulted by the Respondent. The sexual violence involves alleged acts of vaginal and anal intercourse. Defence's position is that the alleged incidents did not happen and submits that the Applicant is consciously or unconsciously "inserting" into her evidence consensual activities that she and the Respondent did, in fact, engage in, but then adding features to make those activities non-consensual.

[69] The trial Judge found that the proposed evidence was relevant by reason of the Applicant's statement to the police of December 31, 2017 and her evidence at trial.

[70] Justice Doody noted the following in her December 31, 2017 statement to the police:

- "memories can be invented and inserted and that was such a common position for us that I might be taking it from somewhere else"
- "so I couldn't tell you with absolute certainty that happened that I am not just inserting it"
- that what she was referring to was "from a different time but I am you know I would say I would I am relatively certain that it happened okay but it is possible okay but it is possible that it didn't."

[71] He also referred to her trial evidence in chief where she twice indicated that she was not sure whether something had happened during one of the alleged incidents or if she was confusing what has happened then with what the defendant has done on other occasions.

[72] Justice Doody considered Crown counsel and Applicant counsel's submissions that her reference to the possibility that memories can be invented and inserted was really an explanation that she wanted to be certain that what she told the officer was correct. The Judge notes that on at least two occasions in her evidence, she testified that she might be confusing her memories of what had happened at the relevant times with what happened between her and the Respondent at other times. He correctly stated that he had not heard all the evidence and wasn't in a position to decide which parts, if any, of her evidence he will accept. As already noted, evidence need not be determinative to be relevant.

[73] The Court is mindful, as was Justice Doody, that evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place (see *R. v. Darrach, op.cit.)*. However, the basis for relevance in this matter comes from the statements and testimony of the Applicant. As stated by the trial Judge:

> "The relevance of the proposed evidence in this case is a direct result of the foundation established by the evidence of the complainant which I have already heard. That evidence gives an air of reality to the relevance of the proposed evidence. That would not be so in many cases."

[74] The Court also rejects the suggestion that Justice Doody failed to properly assess the probative value of the proposed evidence. He identified the relevant principles which are as follows:

- Significant probative value means that the proposed evidence is not so trifling as to be incapable, in the context of all of the evidence, of raising a reasonable doubt

  - R. v. R. V. [2018] O.J. No. 3162

  - "sec. 276 allows the admission of evidence of "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. The adverb "substantially" serves to protect the accused by raising the standard for the judge to exclude evidence once the accused has shown it to have probative value. In a sense, both sides of the equation are heightened in this test, which serves to direct judges to the serious ramifications of the use of evidence of prior sexual activity for all parties in the case".

  - *R. v. Darrach op.cit.*

[75] The Court finds that Justice Doody was correct in finding that the proposed evidence has significant probative value which is not substantially outweighed by the danger of prejudice to the proper administration of justice. He articulated the probative value as follows:

> "In my view, the proposed evidence is of more than trifling relevance. Credibility and reliability of the complainant are the primary issues on this trial. The evidence is proposed to be adduced in order to lend support to the submission, for which there is already some evidence that the complainant's evidence is lacking in one or both of these areas."

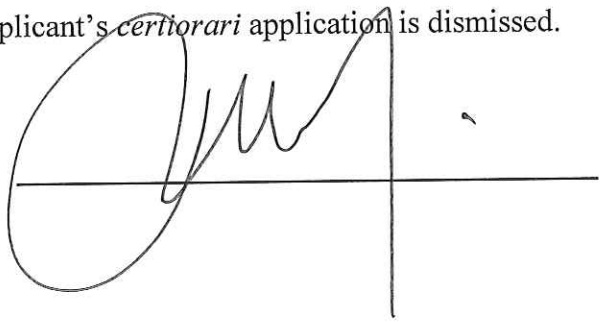
[76] He then went on to consider the factors set out in sec. 276(3) and noted the following:

- the evidence is potentially of great significance to the accused's right to make full answer and defence by challenging the Applicant's credibility and reliability
- the proposed evidence will assist in arriving at a just determination of the case which revolves around credibility and reliability
- it is a judge alone trial
- it does not raise the twin myths
- the Applicant's personal dignity and right to privacy may be significantly alleviated by limiting the proposed evidence; details are not necessary

[77] The Court is therefore of the view that there is no error of law on the face of the record warranting a review of Justice Doody's ruling in this matter.

CONCLUSION

[78] For the reasons stated in this ruling, the Applicant's *certiorari* application is dismissed.



Released: June 11th, 2019

CITATION:, R. v. Boyle, 2019 ONSC 3641
COURT FILE NO.: 18-RD-19579
DATE: June 11th, 2019

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

– and –

JOSHUA BOYLE

Respondent

-and-

CAITLAN COLEMAN

Applicant

-and-

Women's Legal Education and Action Fund

Intervener

-and-

Criminal Lawyer's Association (Ontario)

Intervener

BEFORE: Honourable Justice R. Laliberté

COUNSEL:

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HEARD: May 15th, 2019

RULING ON *CERTIORARI* APPLICATION BROUGHT BY COMPLAINANT

Justice R. Laliberté

Released: June 11th, 2019