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IN THE SUPREME COURT OF ONTARIO
(COURT OF APPEAL)

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant/Appellant

- and -

STEVEN SEABOYER

Respondent

B E T W E E N:

HER MAJESTY THE QUEEN

Applicant/Appellant

- and -

NIGEL GAYME

Respondent

FACTUM ON BEHALF OF THE INTERVENANT
WOMEN'S LEGAL EDUCATION AND ACTION FUND

PART I -- INTRODUCTION

1. By Order dated February 26, 1986, the Honourable Chief Justice of Ontario granted the Women's Legal Education and Action Fund and the Attorney General of Canada leave to intervene in the appeals herein, the said interventions

limited to the constitutional validity of Sections 246.6 and 246.7 of the Criminal Code of Canada.

--Reasons For Judgment of Howland C.J.A. dated February 26, 1986, Appeal Book, (Seaboyer), pp. 25-29

PART II -- THE LAW

2. It is submitted that Sections 246.6 and 246.7 of the Criminal Code of Canada are not violative of Sections 7 and 11(d) of the Canadian Charter of Rights and Freedoms.

3. Sections 246.6 and 246.7 of the Criminal Code of Canada provide, inter alia, for the exclusion of evidence sought to be adduced by or on behalf of the accused. Section 246.6 further provides for procedures governing evidence sought to be introduced by or on behalf of the accused pursuant to Section 246.6(1)(a)(b) and (c).

4. Section 7 of the Canadian Charter of Rights and Freedoms protects the right to "life, liberty and security of the person" and requires that no one be deprived thereof except in accordance with the "principles of fundamental justice". Section 11(d) provides, so far as is pertinent herein, that a person may be proven guilty only according to law in a "fair hearing".

5. It is acknowledged that the accused's right to make full answer and defence is one of the established principles encompassed in the term "fundamental justice" secured by Section 7 of the Canadian Charter of Rights and Freedoms. Further, an accused precluded from making full answer and defence is denied a fair hearing.

--Re Potma and The Queen (1983) 2 C.C.C. (3d) 383 (Ont. C.A.) per Robbins, J.A. at 391

--R. v. Williams (1985), 18 C.C.C. (3d) 356 (Ont. C.A.), leave to appeal refused by S.C.C. on April 4, 1985, per Martin, J.A. at p. 372 375, 376 and 378

6. Accordingly, it is submitted that the constitutionality of the impugned legislation is determined by consideration as to whether its purpose or effects are inconsistent with the accused's right to make full answer and defence.

--R. v. Big M Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385 (S.C.C.) per Dickson, J. at pp. 413-417

7. It is submitted that the exclusion of irrelevant evidence tendered by or on behalf of the accused is consistent with the accused's right to make full answer and defence. An accused is only entitled to elicit relevant evidence.

--Morris v. R. (1983), 36 C.R. (3d) 1 (S.C.C.) per Lamer, J. at p. 13

--Berger, Vivian; "Man's Trial, Women's Tribulations: Rape Cases in the Courtroom" (1977), 77 Col. L.R. 1

8. Evidence is relevant where it serves "to make the existence of any fact of consequence to the determination of the action more probable or less probable than it would be without the evidence."

--Cleary, McCormick on Evidence, Third Edition, 1984 Chapter 16 at pp. 540 to 544

9. It is further submitted that the exclusion of relevant evidence tendered by or on behalf of the accused may be consistent with the accused's right to make full answer and defence. "The common law is replete with rules which exclude relevant evidence, whether proferred by the prosecution or defence. [In many instances] "the introduction of the evidence is said to produce negative side effects on the fact-finding process which outweigh the value of the evidence to that process."

--Doherty, D. "`Sparing' the Complainant `Spoils' the Trial", 40 C.R. (3d) 35 at p. 60

--Authorities cited, Appellant's factum (Seaboyer) paragraph 76

10. It is submitted that the exclusion of relevant and otherwise admissible evidence sought to be adduced by or on behalf of the accused whose minimal probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence is consistent with the accused's right to make full answer and defence.

--Berger, supra, at pp. 54-56

--McCormick on Evidence, supra, Chapter 16, pp. 544 to 548

--"If She Consented Once She Consented Again - A Legal Fallacy In Forceable Rape Cases" (1976), 10 Valparaiso University Law Review 127 at pp. 129 and 149

--Morris v. R., supra, per Lamer J. at pp. 13-14

--Refer also: Appellant's factum (Seaboyer), paragraphs 54 to 57 and 76

11. Accordingly, it is submitted that to the extent to which the impugned legislation's purpose and effect is to exclude either irrelevant evidence or relevant evidence whose relevance is outweighed by substantial policy considerations, it is consistent with the accused's ability to make full answer and defence.

Application of the Above Principles To the Impugned Legislation

12. Section 246.6 of the Criminal Code of Canada provides, inter alia, for the exclusion of evidence sought to be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused subject to three specific exceptions set out therein. Section 246.7 renders inadmissible evidence of sexual reputation for the purpose either of challenging or supporting the credibility of the complainant.

PURPOSE OF IMPUGNED LEGISLATION

13. It is submitted that the purpose of the impugned legislation, considered within the context of other substantive provisions of the Criminal Code of Canada and comparable "rape shield" legislation in foreign jurisdictions is, as reflected in the Appellant's factum (Seaboyer), at paragraph 49:

> (a) to facilitate the reporting of sexual offences to investigate agencies;
>
> (b) to reduce the anxiety of the complainant that has been historically attendant to testifying in Court in support of such allegations by:
>
> (i) limiting the cross-examination to matters relevant to the alleged offence or the credibility of the complainant, and
>
> (ii) providing a procedural framework to determine issues of admissibility with a minimal disruption of the privacy of the complainant; and consequently
>
> (c) to improve the reliability of the fact-finding processes in trials of alleged sexual offences.
>
> --Authorities cited in paragraph 49 of the Appellant's Factum
>
> --Berger, supra, pp. 54-55
>
> --See also R. v. Le Gallant September 4, 1986, unreported, B.C.C.A.

14. It is submitted that the demonstrable purpose of the impugned legislation is consistent with the accused's right to make full answer and defence.

EFFECT OF S.246.6

15. Subject to the concession reflected in paragraph 22, infra, it is submitted that s.246.6:

(1) excludes evidence which, by its very nature,

(a) is irrelevant or minimally relevant to the defence of the accused, and,

(b) tends to confuse the issues material to the trial and arouse hostility or sympathy of the trier of fact without appropriate regard to its probative value;

(2) admits evidence which, by its very nature, is significantly relevant to the defence of the accused.

Relevance of Evidence of Complainant's Sexual Activity

16. More particularly, it is submitted that s.246.6 of the Code excludes all evidence concerning the complainant's sexual activity with persons other than the accused where tendered on the issue of consent because it is irrelevant. The intervenant adopts and relies upon the submissions contained in paragraphs 58 to 66 of the Appellant's factum. (Seaboyer)

17. Further, it is submitted that s.246.6 excludes all evidence concerning the complainant's sexual activity with persons other than the accused where tendered on the issue of mistaken belief in consent unless it is evidence of sexual activity that took place on the same occasion as the sexual activity that forms the subject matter of the alleged offence (s.246.6(1)(c)). It is submitted that s.246.6 thereby provides for the admissibility of the said evidence only where significantly relevant to the defence of mistaken belief in consent. The intervenant adopts and relies upon the submissions contained in paragraphs 68 to 69 of the Appellant's factum (Seaboyer).

18. Further, it is submitted that s.246.6 excludes evidence of the complainant's sexual activity with persons other than the accused where tendered in relation to credibility. (Section 247.7, which excludes evidence of the complainant's sexual <u>reputation</u> where tendered in relation to credibility, is separately considered below.) It is submitted that s.246.6 thereby excludes evidence which is irrelevant to the assessment of the complainant's credibility. The intervenant adopts and relies upon paragraph 73 of the Appellant's factum (Seaboyer).

19. Further, it is submitted that s.246.6 provides for the admissibility of evidence of specific instances of the complainant's sexual activity tending to establish the identity of the person who had sexual contact with the complainant at the time of the alleged offence (s.246(1)(b)).

It is submitted that s.246.6 thereby provides for the admissibility of the said evidence where it is significantly relevant to the defence of identity. The intervenant adopts and relies upon the submissions contained in paragraph 45 of the Appellant's factum (Seaboyer).

20. Further, it is submitted that s.246.6 provides for the admissibility of evidence of the complainant's sexual activity with persons other than the accused that rebuts evidence of the complainant's sexual activity or absence thereof that was previously adduced by the prosecution (s.246.6(1)(a)). It is submitted that this exemption to the general exclusionary rule is confined to the admissibility of evidence which rebuts evidence of the complainant's sexual activity or absence thereof <u>expressly elicited</u> during the examination-in-chief of the complainant or other prosecution witnesses. This interpretation accords with the plain meaning of the exemption and its underlying rationale. The intervenant thereby respectfully disagrees with the submissions contained in paragraphs 43,77, and 78 of the Appellant's factum (Seaboyer). It is submitted that s.246.6 thereby provides for the admissibility of evidence significantly relevant to rebut the evidence elicited by the prosecution.

--Berger, <u>supra</u>, pp. 67-68:

> "One is impeachment by contradiction - a party introduces certain proof, which his opponent attempts to counter. Suppose, for example, that the government in its case-in-chief offers evidence of the previous chastity of the complainant and that this evidence is deemed admissible.

> One could contend that the accused may not respond in kind by attempting to show that the victim was in fact unchaste, since all such proof is beside the point. But this approach ignores the real prejudice that certain types of collateral matters inject into the prosecution: A vision of ravished innocence may inflame the jurors against the defendant as much as an image of tarnished experience sets them against the complaining witness. Moreover, the prosecutor opened the door; he should not be allowed to shut it in the defendant's face. At the very least, the Court should allow impeachment by cross-examination if not by the use of extrinsic evidence." (emphasis added)

--See also, authorities cited in the Appellant's factum (Seaboyer), paragraph 43

--Contra: Appellant's factum (Gayme) paragraphs 71 and 72

Policy Considerations Justifying Exclusion

21. It is submitted that the evidence of the complainant's sexual activities with persons other than the accused, by its very nature tends to confuse the issues material to the trial and arouse the hostility or sympathy of the trier of fact without appropriate regard to its probative value. "Evidence which sidetracks the trier [of fact] from

the real issue before him to issues like the complainant's lifestyle is prejudicial to the accurate determination of the case before him and destructive of the integrity of the trial process." It is submitted that society has a substantial and justifiable interest in excluding this evidence, where it is no more than minimally relevant to the defence of the accused. (The tendency of this type of evidence to unfairly prejudice parties to an action is recognized through rules of evidence which strictly circumscribe the use by the prosecution of evidence of other sexual activities of the accused.) The intervenant adopts and relies upon the submissions contained in paragraphs 74 and 75 of the Appellant's factum (Seaboyer).

--See also, Doherty, supra, at p. 65

SECTION 246.6 AND THE "CONSTITUTIONAL EXEMPTION"

22. It is conceded that, in very limited circumstances, s.246.6 may have the effect of excluding evidence which has significant relevance to the defence advanced by a particular accused. Evidence of the complainant's prior sexual activity tending to prove that the complainant has a bias or motive to fabricate the charge may have significant relevance to the accused's defence. This category of evidence might include evidence of sexual activity offered as the basis of expert psychological or psychiatric opinion that the complainant fantasized or invented the act forming the subject matter of the offence charged. Further, it is arguable that evidence

of a pattern of the complainant's sexual activity so distinctive and so closely resembling the accused's version of the alleged encounter with the complainant as to tend to prove that the complainant consented to the act which forms the subject matter of the offence charged, may have significant relevance to the accused's defence. It is therefore submitted that s.246.6 may, in some instances, deprive the accused of his right to make full answer and defence in contravention of the Charter.

--Berger, supra, at pp. 59-61
pp. 66-67
pp. 98-99

--Doherty, supra, at pp. 56-57

--Authorities cited in Appellant's factum, (Seaboyer) paragraphs 43, 69, and 70

23. In R. v. Rao (1984), 12 C.C.C. (3d) 97, this Honourable Court considered the constitutionality of s.10(1)(a) of the Narcotic Control Act R.S.C. 1970, as amended, which, inter alia, authorizes the warrantless search of any place other than a dwelling house. Martin J.A. stated at p. 125:

Section 10(1)(*a*) does not, on its face, necessarily clash with s. 8 of the Charter although in some circumstances a warrantless search authorized by that subsection may, in fact, infringe the constitutional requirement of reasonableness secured by s. 8 of the Charter, depending upon the circumstances surrounding the particular search. The statute is inoperative to the extent that it authorizes an unreasonable search. Section 52(1) of the *Constitution Act, 1982* reads:

> 52(1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, *to the extent of the inconsistency*, of no force or effect.

(Emphasis added.)

In *R. v. Oakes* (1983), 40 O.R. (2d) 660, 2 C.C.C. (3d) 339, 145 D.L.R. (3d) 123, this Court held that s. 8 of the *Narcotic Control Act* was unconstitutional because the reverse onus clause which was an integral part of the section contravened the presumption of innocence secured by s. 11(*d*) of the Charter. The Court in that case held that it was not entitled to rewrite the provisions of s. 8 of the Act or to apply it on a case-by-case basis, depending upon whether the facts of a given case made the presumption created by the section reasonable. The presumption created by the section was on its face unreasonable and hence could not survive when measured against the Charter's guarantee of the presumption of innocence. In my view, the warrantless search powers conferred by s. 10(1)(*a*) of the *Narcotic Control Act* are not on their face necessarily unreasonable and do not necessarily collide with the Charter, although warrantless searches authorized by s. 10(1)(*a*) may in some circumstances, come into collision with the Charter's protection against unreasonable searches and seizures. It is not like the reverse onus contained in s. 8 of the *Narcotic Control Act*, which on its face collided with the presumption of innocence secured by s. 8 of the Charter. The right to be presumed innocent prescribed by s. 11(*d*) of the Charter is a concept of fixed meaning (even if there is not universal agreement as to that meaning), whereas whether a particular search and seizure, under statutory authority, meets the standard of reasonableness may depend upon the circumstances surrounding that search and seizure. Accordingly, I do not consider that s. 10(1)(*a*) is unconstitutional, but hold that it is inoperative to the extent that it is inconsistent with s. 8 of the Charter. In my opinion, s. 10(1)(*a*) is inoperative to the extent that it authorizes the search of a person's office without a warrant, in the absence of circumstances which make the obtaining of a warrant impracticable; beyond that it is unnecessary to go in the present case.

24. It is submitted that section 246.6 of the Code does not, on its face, necessarily clash with sections 7 and 11(d) of the Charter. Further, applied to the vast majority of factual circumstances, it resolves the problems created by the common law and former section 142 of the Code by striking a proper balance of fairness as between the parties. Whether a particular exclusion of evidence under the statutory authority of section 246.6 meets the standards of fundamental justice and of a fair hearing will depend upon the particular circumstances surrounding that exclusion of evidence.

--Refer: R. v. Le Gallant (B.C.C.A.), supra, at pp. 15-17

R. v. Corbett (1984), 17 C.C.C. (3d) 129 (B.C.C.A.)

R. v. Rao (1984), 12 C.C.C. (3d) 97 (Ont. C.A.), leave to appeal to S.C.C. refused October 1, 1984

25. It is therefore respectfully submitted that, to the extent that s.246.6 authorizes the exclusion of evidence significantly relevant to the defence, it is inconsistent with sections 7 and 11(d) of the Charter and, to that extent only, of no force and effect.

--R. v. Rao, supra

--R. v. Cecchini (1986), 22 C.C.C. (3d) 323 (Ont. H.C.)

--R. v. Videoflicks (1985,) 15 C.C.C. (3d) 353 (Ont. C. A.), rev'd in part (December, 1986, unreported, S.C.C.)

--R. v. Coombs (1986), 49 C.R. (3d) 78 (Nfld. S.C.) per Steele J. at p. 87

--R. v. Oquataq (1985), 18 C.C.C. (3d) 440 (N.W.T.S.C.) per Marshall J. at p. 452

--Compare: R. v. Oakes (1986), 24 C.C.C. (3d) 321 (S.C.C.)

26. It is submitted that this approach recognizes that the strict application of virtually all exclusionary rules of evidence, whether common law or statutory, could in limited circumstances, deprive the accused of his constitutional right to a fair trial secured by the Charter. All exclusionary rules of evidence are not, thereby, unconstitutional.

--Refer: R. v. Williams supra, per Martin J.A. at pp. 372, 375, 376 and 378.

27. It is further submitted that this approach accords with the judicial treatment of "rape shield legislation" in some American jurisdictions, as circumscribed by the constitutional guarantees of due process (5th Amendment), confrontation and the right to present a defence by calling witnesses favourable to the defence (6th Amendment).

--Refer: Doherty, supra, pp. 60-62

--Pennsylvania v. Black 487 A. 2d 396 (S.C. Pennsylvania)(1985) per Cavanaugh J. at p. 401

--Massachusetts v. Joyce 415 N.E. 2d 181 (S.C. Mass.)(1981) per Liacos J. at pp. 185-187

--West Virginia v. Green 260 S.E. 2d 257 (C.A. West Virginia) (1979) per Harshbarger J. at p. 264

--New Hampshire v. Howard 426 A.2d 457 (S.C. New Hampshire)(1981) per Brock, J. at pp. 460-462

--New Hampshire v. LaClair 433 A 2d 1326 (S.C. New Hampshire) (1981) per King C.J. at pp. 1328-1329

28. It is submitted that this approach furthers the legitimate, constitutional purpose and effect of s.246.6 of the Code in that:

(a) It preserves the presumptive inadmissibility of evidence of the complainant's sexual activities with persons other than the accused which accords generally with the evidence's lack of, or minimal, relevance;

(b) It preserves specific exemptions permitting the accused to adduce said evidence where the evidence is significantly relevant;

(c) It preserves the procedural framework within which issues of admissibility are determined;

(d) It permits relief against the strict application of s.246.6 in circumstances where the accused is deprived of full answer and defence.

SECTION 246.7 OF THE CODE

29. Section 246.7 of the Code excludes evidence of sexual reputation, whether general or specific, tendered for the purpose of challenging or supporting the credibility of the complainant. As contended in paragraphs 13 and 14, supra, its purpose, considered together with s.246.6 is constitutional.

Effect of s.246.7

30. It is submitted that, unlike s.246.6, s.246.7 of the Code, in all circumstances, only has the effect of excluding irrelevant or minimally relevant evidence, whether tendered by the accused or the prosecution, in that:

(a) evidence of the complainant's sexual activities with persons other than the accused, whether by way of sexual reputation or specific instances of sexual activity, is at best irrelevant or minimally relevant to the assessment of the complainant's credibility. The intervenant adopts and relies upon the submissions contained in paragraph 73 of the Appellant's factum (Seaboyer);

(b) evidence of the complainant's sexual reputation is, at best, unreliable as a

means of proving the complainant's veracity or lack thereof. The intervenant adopts and relies upon the submissions contained in paragraphs 79 to 82 of the Appellant's factum (Seaboyer).

Policy Considerations Justifying the Exclusion

31. It is submitted that evidence of sexual reputation, by its very nature, tends to confuse the issues material to the trial and arouse the hostility or sympathy of the trier of fact without appropriate regard to its probative value. The intervenant adopts and relies upon the submissions contained in paragraphs 74, 79 and 80 of the Appellant's factum (Seaboyer).

--See also Doherty, supra, at pp. 57-58:

"Section 246.7, like s.246.6, is absolute and leaves no room for the exercise of judicial discretion. Section 246.7 is, however, limited to evidence which is relevant only to the complainant's credibility. The court in Bird may have been correct in its view that reputation evidence of the sort contemplated by s. 246.7 is of such limited probative value on the issue of credibility, and so potentially prejudicial, that a rule of absolute exclusion of this type of evidence does not in the result put significant evidence beyond the consideration of the trier of fact."

32. It is accordingly submitted that section 246.7 of the Code is consistent with the accused's right to make full answer and defence and, therefore, constitutional.

PART III -- ORDER REQUESTED

33. It is respectfully requested that the constitutional validity of sections 246.6 and 246.7 of the Code be upheld, in accordance with the submissions contained herein.

ALL OF WHICH is respectfully submitted

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TABLE OF AUTHORITIES

"If She Consented Once She Consented Again - A
Legal Fallacy In Forceable Rape Cases"
(1976), 10 Valparaiso University Law Review 127