Citation: *R. v. James,* 2025 YKTC 49

Date: 20251009
Docket: 24-00185
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Cairns

REX

v.

KASHIES CHARLES ANDREW JAMES

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4(1) of the *Criminal Code*.

Publication of any document, or broadcast or transmission in any way of an application made, evidence taken, information given, representations made or the decision of a judge, unless ordered otherwise, under ss. 278.93 or a hearing under ss. 278.94 of the *Criminal Code* is prohibited pursuant to s. 278.95 of the *Criminal Code*.

Appearances:
William McDiarmid — Counsel for the Crown
Kevin Drolet — Counsel for the Defence
Susan Bogle — Counsel for the Complainant

RULING ON APPLICATION

Overview

[1] Kashies James ("Mr. James" or the "Applicant") is charged with committing the indictable offences of sexual assault contrary to s. 271 of the *Criminal Code* (the "*Code*") and touching for a sexual purpose contrary to s. 151 of the *Code*. The allegations are that Mr. James sexually assaulted a 14-year-old girl (the "Complainant") on or about June 25, 2023, in Whitehorse. The Complainant was

unable to identify her alleged assailant by name; however, DNA evidence derived from semen found on the Complainant's clothes was later determined to belong to Mr. James.

[2] Mr. James does not deny engaging in sexual activity with the Complainant. Mr. James says that the sexual activity was consensual and that he believed the Complainant to be an adult.

[3] Mr. James now brings an application to have various records arising from an unrelated police investigation that took place in March 2024, almost nine months after the allegations that bring him before the Court, admitted for the purposes of cross-examination at his trial. In his application, Mr. James says that the principal issues at trial are consent and mistaken belief as to age.

[4] Mr. James previously made an application pursuant to ss. 278.1 to 278.91 of the *Code* for production of various RCMP occurrence reports and related investigative files. After an expedited process, on May 2, 2025, production of some of the records that Mr. James sought was ordered by Judge Gill in *R. v. James*, 2025 YKTC 18. The records were received by Mr. James on May 5, 2025. The trial on these charges was set to proceed on May 7, 2025.

[5] On the day of trial, Mr. James brought a written application to determine the admissibility at trial of the records produced to him following the above-noted ruling. Sections 278.93 and 278.94 set out the two-stage procedure for such an application:

1. Section 278.93 governs the application for a hearing; and

2. Section 278.94 governs the hearing to determine the admissibility of the evidence.

[6] My reasons for allowing Mr. James' application to proceed to a hearing are set out in *R. v. James,* 2025 YKTC 45. The stage two hearing proceeded on September 8, 2025, at which time the Complainant was represented by counsel.

[7] For the following reasons, I find the RCMP records that describe the police investigation into the March 2024 sexual assault allegation, summarize the interviews with the Complainant and a Person X, reveal a message exchange between the Complainant and Person X, and include the Complainant's dating app profile are all inadmissible.

Application

[8] The application filed by Mr. James on May 7, 2025, posits that the RCMP records are highly probative of the Complainant's credibility (whether she is telling the truth), her unreliability as a witness and her misrepresentation of her age. Mr. James bears the onus, on a balance of probabilities, of establishing that the records are relevant to an issue at trial. Counsel for Mr. James submits that, where the records contain evidence of the Complainant's sexual activity with another individual, admission is not sought to support an argument that, by reason of that sexual activity, the Complainant is less worthy of belief or more likely to have consented.

[9] The records in issue are presumptively inadmissible (s. 278.92(2) of the *Code*). Certain of the records describe other sexual activity of the Complainant unrelated to Mr. James. I must determine if those records are admissible by applying the test in s. 276 of the *Code* (s. 278.92(2)(a) of the *Code*). The remaining records do not describe other sexual activity of the Complainant. I must determine if these records are admissible in accordance with the test in s. 278.92(2)(b) and the factors listed at s. 278.92(3) of the *Code*.

[10] Before moving on, at the s. 278.94 hearing, counsel for Mr. James argued that the focus of the application was on the information found on the Complainant's profile in the dating app. However, as Mr. James did not formally withdraw his application in relation to the other records, a ruling is required on those as well.

Admissibility pursuant to s. 276 of the *Code*

[11] The admissibility test for records that include evidence that the Complainant has engaged in other sexual activity is found in s. 276(2) and (3) of the *Code*:

> 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
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> (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.
>
> (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);
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> (b) is relevant to an issue at trial; and
>
> (c) is of specific instances of sexual activity; and
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> (d) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

(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;
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> (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;
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> (d) the need to remove from the fact-finding process any discriminatory belief or bias;
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> (e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
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> (f) the potential prejudice to the complainant's personal dignity and right of privacy;
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> (g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
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> (h) any other factor that the judge, provincial court judge or justice considers relevant.

(4) For the purpose of this section, "sexual activity" includes any communication made for a sexual purpose or whose content is of a sexual nature.

[12] At issue are RCMP records (the "records") arising from a police investigation into allegations of sexual assault made by the Complainant in March 2024. The allegations involve an individual other than the Applicant and there is no evidence of a connection to Mr. James' case. The records include a summary of a RCMP interview dated March 11, 2024, with an individual ("Person X") describing a sexual encounter with the Complainant. There is also a summary of a RCMP interview dated March 26, 2024, with the Complainant where she describes the same encounter and alleges that Person X sexually assaulted her.

[13] In brief, the records reveal that, in March 2024, the Complainant and Person X agreed to meet up through an online dating website/app, that Person X picked up the Complainant, she appeared intoxicated and requested that Person X give her money, and there was some kissing and sexual touching over the clothes. Notably, both Person X and the Complainant provide similar descriptions of the sexual activity. Also in issue are records of messaging between Person X and the Complainant in relation to this incident. These show that the Complainant represented herself as 24 years old, as did Person X. When, after the sexual encounter, Person X communicated that he would not be returning to pick up the Complainant, she responded with a message that she would be calling the police to report that he sexually assaulted her. The records also reveal that the RCMP considered, but decided against, charging the Complainant with extortion.

[14] In this application, the burden is on Mr. James to explain the relevance of the records. The threshold for relevance is low (*R. v. Schneider*, 2022 SCC 34, at para. 39).

[15] As stated in *R. v. Luciano,* 2011 ONCA 89, at para. 204,

> Relevance is not an inherent characteristic of any item of evidence. Relevance exists as a relation between an item of evidence proposed for admission and a proposition of fact that the proponent seeks to establish by its introduction. Relevance is a matter of everyday experience and common sense. ...An item of evidence is relevant if it renders the fact it seeks to establish slightly more or less probable than it (the fact) would be without the evidence, through the application of everyday experience and common sense.

[16] Paragraph 8 of Mr. James' application sets out that the records are relevant in that they:

a. provide real evidence emanating from the Complainant that she actively misrepresented her age to members of the public;

b. contain evidence regarding the Complainant's possession, use and abuse of alcohol;

c. include strong evidence of the Complainant's readiness to lie to police for personal advantage;

d. include strong evidence of the Complainant's inclination to lie in response to minor slights;

e. demonstrate the Complainant's willingness to make false accusations of serious malfeasance against others.

Section 276(2)(a) of the *Code* - twin myths

[17] Counsel for Mr. James argues that admissibility of the records is not sought for the purpose of supporting one of the twin myths (s. 276(1) of the *Code*), submitting that the records are "highly probative of her credibility" and, through cross-examination, will be used to demonstrate the Complainant's "lack of respect for the truth". As noted in *R. v. Goldfinch*, 2019 SCC 38, para. 56, credibility is an issue that pervades most trials and bare assertions of relevance to credibility do not satisfy s. 276(2) (*Goldfinch*,

para. 51). To be potentially admissible, the relevance and probative value of the records must go beyond a general ability to undermine the Complainant's credibility and respond to a specific issue at trial that could not be addressed or resolved in the absence of that evidence (*R. v. T.W.W.*, 2024 SCC 19, at paras. 27 and 28).

[18] In my view, the bulleted list above – particularly c., d., and e. – strongly suggests that Mr. James' proposed use of the records is to attack the Complainant's credibility generally by portraying her as a liar not worthy of belief. Attacks on general credibility are not permitted pursuant to s. 276 of the *Code* (*R. v. Reid*, 2014 ONSC 1795, para. 22). The Applicant has failed to establish a connection between the Complainant's sexual history and his defence (*R. v. Darrach*, 2000 SCC 46, para. 56).

Section 276(2)(b) of the *Code* – relevance to an issue at trial

[19] I find the evidence in these records has no relevance to any issues at trial and lacks probative value. Evidence that the Complainant engaged with Person X on a dating app almost nine months after the allegation against Mr. James and, through that app, agreed to meet up with Person X, has no relevance to the trial issues of consent or Mr. James' belief that the Complainant was an adult. In addition, the surrounding circumstances of the Complainant's encounter with Person X are dissimilar to the allegations describing the encounter with Mr. James.

[20] In paragraph 8 b. of the application, Mr. James argues that records are relevant to show that the Complainant possessed, used, and abused alcohol. Admitting the records for this purpose would permit a general attack on the Complainant's credibility on a collateral issue. The Applicant has not established how evidence of the

Complainant's relationship with alcohol on an occasion almost nine months after the allegation in respect of Mr. James has any relevance.

[21] In paragraphs 8 c., d., and e. of the application, Mr. James advances the proposition that the records are relevant to the Complainant's credibility and to support a finding that she is a liar. I find that the content of the records does not support these sweeping statements and are of no relevance to Mr. James' trial. It is unclear what Mr. James means by "personal advantage" in relation to the records nor what relevance that might be to trial issues. Similarly, it is unclear what is meant by "minor slights" or what relevance the Complainant's response to those may have at Mr. James' trial. The records do not support Mr. James' position that the Complainant made false accusations against Person X, given the consistency in the accounts of sexual activity provided in the records by the Complainant and Person X. On this point, other allegations of sexual assault made by a complainant are typically seen as collateral and thus inadmissible. While there is a limited exception where such allegations can be proven to be false (*R. v. Riley* (1992), 11 O.R. (3d) 151 (C.A.), that exception does not apply here.

Section 276(2)(c) of the *Code* – specific instances of sexual activity

[22] The records are of a specific instance of sexual activity.

Section 276(2)(d) of the *Code* – significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice

[23] Having found that the records are not relevant, it follows that they do not have probative value. Further, in my view, if the records were admitted, there is a significant risk of prejudice to the proper administration of justice by allowing the trial to be derailed through a focus on unjustifiably scrutinizing the minutiae of the Complainant's life and character in an attempt to discredit her by reference to unrelated and dissimilar circumstances which are remote in time — all of which would jeopardize the truth-seeking function of the trial (*R. v. J.J.*, 2022 SCC 28, at para. 1).

Section 276(3) of the *Code* – factors for consideration

[24] Section 276(3) of the *Code* requires me to consider listed factors in determining whether the records are admissible pursuant to s. 276(2) of the *Code*. As set out below, my consideration of these factors does not support admissibility.

[25] The Applicant did not demonstrate that the evidence in the records goes to a legitimate aspect of his defence, is integral to his ability to make full answer and defence (*Goldfinch,* para. 95 and 96), and "essential to the interests of justice" (*T.W.W.*, para. 28). There is nothing about the outcome of this application that will interfere with Mr. James ability to advance the defence of consent or his belief that the Complainant was an adult (*R. v. Alfred*, 2021 NSSC 39, at para. 9). An accused's right to a fair trial does not guarantee the most favourable procedures imaginable (*Goldfinch*, para. 30). Further, a fair trial does not allow the truth-seeking function of a trial to be distorted by allowing the admission of irrelevant and prejudicial material (*Darrach*, para. 24). I find

that admission of the records would run counter to society's interest in encouraging the reporting of sexual assault offences as it would allow the Complainant to be cross-examined about unrelated and irrelevant circumstances. As the records are neither relevant nor probative, there is no reasonable prospect that their admission would assist in arriving at a just determination of the case. Perhaps most significantly, there would be great potential for prejudice to the Complainant's personal dignity and right to privacy by allowing her to be cross-examined about irrelevant personal matters (*R. v. T.W.W.*, 2022 BCCA 312, at para. 194), which include an unrelated sexual encounter and that the RCMP considered charging her with extortion in relation to that incident. The concern about the Complainant's personal dignity and right to privacy is heightened as the Complainant is a young person (*A.B. v. Bragg Communications Inc.*, 2012 SCC 46, at para. 17; *R. v. R.V.,* 2019 SCC 41, at para. 68). Finally, admission of the records has the potential to adversely impact the Complainant's right to full protection and benefit of the law by undermining the protections intended through s. 276 of the *Code*.

[26] Balancing the factors in s. 276(3), I find that the records containing evidence of the Complainant's other sexual activity are inadmissible.

Section 278.92(2)(b) of the *Code* – admissibility

[27] The remaining records in issue are screen shots of the Complainant's dating app profile, which contain some general information about her and some personal information about her sexual preferences. The records do not contain evidence that the Complainant engaged in other sexual activity and, as such, are not captured by the admissibility test in s. 276 of the *Code*. However, as with records captured by s. 276,

these records are presumptively inadmissible. The governing test is found in s. 278.92(2):

> 278.92(2) The evidence is inadmissible unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 278.93 and 278.94,
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> ...
>
> (b) in any other case, that the evidence is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.
>
> (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) society's interest in encouraging the obtaining of treatment by complainants of sexual offences;
>
> (d) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
>
> (e) the need to remove from the fact-finding process any discriminatory belief or bias;
>
> (f) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
>
> (g) the potential prejudice to the complainant's personal dignity and right of privacy;
>
> (h) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
>
> (i) any other factor that the judge, provincial court judge or justice considers relevant.

[28] To summarize, the evidence is inadmissible unless I determine that it is relevant to an issue at trial and has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. For the reasons that follow, I find that the record is neither relevant nor of probative value to trial issues. I find that admitting the record would create a danger of prejudice to the administration of justice.

[29] By way of background, on August 20, 2025, prior to the s. 278.94 hearing, Mr. James filed an affidavit in support of the application. His affidavit evidence describes personal details he says the Complainant shared with him. Counsel for Mr. James argues that the sharing of this information is inconsistent with the sexual assault alleged. In oral submissions during the s. 278.94 hearing, counsel for Mr. James confirmed that the Complainant's dating app profile is the focus of Mr. James' application. The Applicant argues that the evidence from the dating app profile is relevant to Mr. James' defence that the sexual activity was consensual and his belief that the Complainant was an adult. Summarized non-exhaustively, the dating app profile details are that the Complainant is 24 years old, wants a baby soon, is an occasional smoker, drinks socially, graduated from [redacted] high school, likes dogs, and likes drinking and dancing.

[30] The Applicant's affidavit alleges that the Complainant provided him with consistent information, namely, that she graduated from [redacted], likes to drink and dance, likes dogs, that she is over 19, and wants to have children soon. Mr. James argues that the personal details he says the Complainant shared with him, being consistent with the representations made by the Complainant as found in her dating app

profile, provide a useful source of material for cross-examination should the Complainant deny having shared personal details with him. He further argues that the Complainant's representation of herself as older than she is on the dating app demonstrates that she misrepresents her age to the public; this, he argues is relevant to his belief that she was an adult.

[31] The Applicant goes on to argue that the details in the records are relevant not for their truth, but because he is aware of them from his encounter with the Complainant; he says they are information otherwise unknown to him that is consistent with the Complainant's dating app profile. Counsel for Mr. James argues that the Applicant's knowledge of personal facts about the Complainant is consistent with his defence that this was a consensual sexual encounter and "objectively unlikely" to have been shared by the Complainant with an attacker.

[32] As described by the Supreme Court of Canada in G*oldfinch,* at para. 95, the Applicant must "demonstrate that the evidence goes to a legitimate aspect of his defence and is integral to his ability to make full answer and defence. This requires that the accused be able to identify specific facts or issues relating to his defence that can be properly understood and resolved by the trier of fact only if reference is made to the sexual activity evidence in question." As the Court found in *Alfred*, I find that nothing about the outcome of this application will interfere with the advancement of Mr. James' anticipated defence. He will be free to cross-examine the Complainant on the issue of consent and age, and to testify himself about the sexual activity and his belief that the Complainant was an adult.

[33] Turning to the relevant factors listed in s. 278.92(3), I find that Mr. James' right to make full answer and defence will not be impaired if the records are not admitted. The record is not integral to Mr. James' defence as the defence of consent or his belief in the Complainant's age could be understood and resolved without reference to the dating app profile from March 2024. I find that, given the lack of relevance or probative value, admitting of the record would not assist in arriving at a just determination of Mr. James. Admission of the record would run counter to society's interest in encouraging the reporting of sexual assault offences as it would lead to a situation where the Complainant will be cross-examined in relation to an incident remote in time and unrelated to the allegations against Mr. James. This would negatively impact the Complainant's dignity and serve to discourage vulnerable complainants from coming forward to report sexual offence allegations.

[34] I find that the Applicant has failed to establish the relevance of the Complainant's dating app profile information to the issues of consent and his belief in the Complainant's age. The fact that these personal details were available on the dating app profile in March 2024 does not make it more or less likely that she provided similar information to the Applicant in June 2023, consented to sexual activity with him, or misrepresented her age to him. The record of the dating app profile is irrelevant and therefore inadmissible. However, if I am wrong, and the record has relevance to an issue at trial, it is my view that it does not have significant probative value. To be admissible, its probative value must be significant and not be substantially

outweighed by the danger of prejudice to the proper administration of justice. That is not the situation here.

[35] Mr. James' application is dismissed.

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CAIRNS T.C.J.