SUPREME COURT OF YUKON

Citation: *R.* v. *Field,* 2010 YKSC 12

Date: 20100322
Docket S.C. No.: 09-01508
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND:

BILLY EDWARD FIELD

Before: Mr. Justice L.F. Gower

Publication of information that could disclose the identity of the complainant has been prohibited by court order pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Peter Chisholm
and Jennifer Grandy — Counsel for the Crown
Malcolm Campbell
and Kimberly Hawkins — Counsel for the Defence

RULING ON APPLICATION TO ADDUCE EVIDENCE DELIVERED FROM THE BENCH

[1] GOWER J. (Oral): In summary form, the accused wishes to adduce the following evidence: that he had a prior consensual sexual relationship with the complainant in this matter; that periodically they would get together and have consensual vaginal sex; that on occasion the accused asked if the complainant would consent to anal sex, but that she refused; and that the accused respected that refusal and did not pursue the issue.

[2] As I understand the submissions of counsel, it is expected that there will be evidence in this trial that the complainant had some form of a date rape drug in her system which was detected a number of hours after the sexual intercourse between them on October 25 and 26, 2008, which was vaginal sexual intercourse. The accused's position is that he did not consume such a drug nor did he witness the complainant doing so and has no knowledge of how that drug came to be in her system.

[3] The accused will also testify that he did not have anal intercourse with the complainant on that occasion and the accused will argue that there is no evidence of such anal intercourse having occurred on that occasion.

[4] The specific evidence that the accused wishes to elicit is that on some of these prior occasions when he was with the complainant he asked her to have anal sexual intercourse and she refused. The accused argues that this evidence is relevant to Count 1 specifically and that it is only proffered for the purpose of creating a reasonable doubt on that count.

[5] The argument goes something like this: The only possible motive for the accused to have administered a drug to the complainant would have been to obtain some form of sexual gratification which he otherwise was unable to obtain, in particular, anal sex. Therefore, the absence of evidence that anal sex occurred on that particular occasion is an indication that, logically, he did not or would not have administered the drug. In this sense, the accused says that the disputed evidence goes to a lack of motive on his part, is part of the theory of the defence, and he needs to adduce this evidence in order to make full answer and defence.

[6] The Crown is opposed to this evidence being adduced because Count 1 is inextricably linked with Count 2, which is a charge of sexual assault upon the complainant. However, as I understood the submissions of defence counsel, the evidence regarding the desired anal sex is not intended to be probative of anything with respect to Count 2 or intended to raise a reasonable doubt about the accused's guilt on Count 2. I further understood that defence counsel would not be opposed to a specific direction by me to the jury that they could draw no inferences at all from the evidence regarding the anal sex desired by the accused and refused by the complainant with respect to Count 2.

[7] Crown counsel has a residual concern that the jury may nevertheless, despite such a warning in the charge, draw the impermissible inference that because the accused had previous consensual vaginal intercourse with the complainant that she must therefore have been more likely to have consented to vaginal intercourse on the occasion in question. My difficulty is that Count 1 is a charge under s. 246(b) of the *Criminal Code* and is not, therefore, an enumerated offence under s. 276(1). Of course, it goes without saying that the Crown is responsible for drafting the Indictment and must bear the consequences of joining the two charges in a single Indictment.

[8] Despite the connection between Counts 1 and 2, I am not persuaded that a s. 276 application is necessary in order to adduce the evidence sought by the accused with respect to Count 1 and I am satisfied that an appropriate instruction to the jury will or ought to prevent them from drawing the impermissible inference which causes the Crown some concern.

[9] Where that leaves me, then, is to rule on the defence application on the basis of a simple question of relevance, and whether the probative value outweighs the prejudicial effect, and the extent to which the accused ought to be allowed to adduce this evidence in order to make full answer and defence. I am satisfied that the evidence at issue is of sufficient probative value on the issue of motive for Count 1 that the accused ought to be allowed to adduce that evidence. However, I will deal with this issue one step at a time as the trial unfolds. The Crown is free to renew its objection, depending on the specific nature of the questions which are asked by defence counsel on the point.

[10] In short, although this was originally framed as an application under s. 276, I do not find it necessary to make a ruling about whether the evidence sought to be adduced is capable of being admissible under s. 276.1(4)(c), because I do not treat the application as one brought under s. 276.1.

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GOWER J.