Citation: *R.* v. *W.J.A., et al.*, 2010 YKTC 108 Date: 20101008
Docket: 09-00567
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before: His Honour Judge Cozens

REGINA

v.

W.J.A. & P.J.A.

Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to sections 486.4 and 486.5 of the *Criminal Code.*

Appearances:
Robert Beck — Counsel for the Crown
Malcolm Campbell — Counsel for W.J.A.
Gordon Coffin — Counsel for P.J.A

RULING ON VOIR DIRE

Overview

[1] P.A. and W.A. have been jointly charged with the offences of sexual assault and unlawful confinement. Each defendant has also separately been charged as a party to the sexual assault committed by the other defendant. W.A. has been further charged with assault, uttering a threat to cause bodily harm, and robbery. M.A. is the sole complainant in all these offences. W.A. is the complainant's husband, and P.A. is his brother.

[2] Both defendants have applied, pursuant to ss. 276.1 and 276.2 of the *Criminal Code*, to be allowed to adduce evidence at trial of prior sexual activity between the complainant and themselves.

[3] The Application filed by P.A. seeks the right to be able to ask questions concerning previous sexual activity between the complainant, W.A. and P.A. The only difference in the Application of W.A. is the substitution of the word “among” for the word “between”. Both defendants state in their affidavit evidence that the prior sexual history will show “a pattern of conduct where [M.A.] consented on several occasions to having sexual relations with my brother and me”. (Affidavit of P.A. filed August 23, 2010 at para. 10; Affidavit of W.A. filed August 25, 2010 at para. 9)

[4] The two affidavits filed by P.A. allege the existence of a prior consensual sexual relationship with the complainant while they were dating that continued on occasion after the relationship ended and after the complainant first dated and then married W.A. P.A. states that on some occasions his sexual activity with the complainant included W.A. as a participant or spectator, with the first such occasion likely occurring in 2005 and the last occasion occurring at W.A.’s home in Ross River, approximately one month before the events of October 23, 2009 which gave rise to the charges against him.

[5] The two affidavits filed by W.A. repeat the information deposed to by P.A. In addition, his affidavit filed September 8, 2010 attaches two Exhibits. The first Exhibit is a list alleged to have been prepared almost entirely by the complainant between 2003 and 2005 in which she identifies the individuals she has had sex with and the nature of the sexual activity. The second Exhibit is a letter she is alleged to have written to W.A.

concerning some sexual activity, including reference to a threesome with an individual noted in the first Exhibit.

[6] Although the filed Applications request only the admission of evidence about three-way sexual activity between or among the complainant and the two accused, at the hearing counsel broadened the application to include other sexual activity of the complainant, including sexual activity with third parties. Crown counsel was not opposed to the applications being broader than that strictly set out in the Notices of Application.

[7] The defence for both defendants is that of consent, although counsel also submitted that, in the absence of consent, their clients had an honest but mistaken belief that consent had been given for the sexual activity in question.

Hearing

[8] The applications proceeded on the basis of the affidavit evidence. There was no *viva voce* evidence and the accused were not cross-examined on their affidavits. After reviewing the materials filed and hearing submissions from counsel, I ruled as follows:

> Defence counsel can cross-examine the complainant or adduce evidence with respect to the following:
>
> 1. as to whether the complainant has ever had a consensual sexual relationship with either of the accused and, in particular:
>
>   a. the context in which the consensual sexual activity occurred, i.e. marriage, common-law relationship, etc.;
>   b. whether there was consensual sexual activity on more than one occasion; and
>   c. the last time she engaged in the consensual sexual activity.

2. as to whether the complainant has ever engaged in consensual three-way sexual activity with both accused and, in particular:

    a. how many times such sexual activity occurred;
    b. where it occurred;
    c. the last occasion it occurred; and
    d. the nature of the sexual activity.

    No evidence shall be adduced in regard to sexual activity with any other individuals, including alleged three-way sexual activity involving one of the accused only.

[9] For ease of reference, I subsequently provided a draft copy of the above ruling to Crown and defence counsel on September 21, 2010. Although not included in this copy, I also ruled orally that the evidence of three-way sexual activity was limited to occasions from and including 2005 to the present.

[10] These are the reasons for my ruling.

Statutory Authority and Procedure

[11] Section 276(1) of the *Code* says that for specified offences, evidence of a complainant's prior sexual activity is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge, or that the complainant is less worthy of belief.

[12] Section 276(2) of the *Code* provides that in a prosecution for one of the enumerated offences, no evidence shall 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 court determines in accordance with procedural requirements that the

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

[13] Section 276(3) requires the court, when considering the admissibility of evidence of the complainant's prior sexual activity, to take into account the following factors:

> a) the interests of justice, including the right of the accused to make a full answer and defence;
> b) society's interest in encouraging the reporting of sexual assault offences;
> c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
> d) the need to remove from the fact-finding process any discriminatory belief or bias;
> e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;
> f) the potential prejudice to the complainant's personal dignity and right of privacy;
> g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and
> h) any other factor that the judge, provincial court judge or justice considers relevant.

[14] Sections 276.1 and 276.2 set out a two-stage process for the s. 276(2) determination. Firstly, under s. 276.1, an application must be in writing and set out the detailed particulars of the evidence that the accused seeks to adduce and the relevance of that evidence to an issue at trial. If the court is satisfied that the application complies with this requirement, that adequate notice of the application was provided to the Crown and the court, and that the evidence sought to be adduced is capable of being admissible under s. 276(2), then the application will be granted and the court will hold a hearing under s. 276.2 to determine whether the evidence is admissible at trial.

[15] There is authority for the proposition that the first stage determination of whether the proposed evidence is admissible under s. 276(2) involves a facial consideration only, with any doubts about the admissibility of the proposed evidence being best left to the s. 276.2 hearing. It is only when the evidence is clearly incapable of being admitted that the application is dismissed at the first stage. (***R.*** v. ***Ecker*** (1995), 96 C.C.C. (3d) 161 (Sask.C.A.) at para. 61). This more cursory approach to the stage one analysis was questioned by Stuart J. in ***R.*** v. ***Roberts***, [1999] Y.J. No. 58 (T.C.). Stuart J. held in para. 54 that the stage one analysis:

> …is meant to be more than an administrative check to ensure proper information and timely notice. Section 276.1(4)(c), in requiring at stage one that the judge must be satisfied the evidence is capable of being admitted under s. 276(2), places a clear onus on the court to make some hard decisions before progressing to stage two. Stage one is not merely a perfunctory analysis of the application.

[16] Although a thorough and complete application of the criteria in s. 276(3) is best made in the second stage, these factors are still relevant to the s. 276.1 determination. (***Ecker*** at para. 61; ***Roberts*** at para. 51). As stated by Stuart J. in para. 52 of ***Roberts***

> …Stage one has a higher tolerance and threshold than stage two for negative impacts on the criteria of s. 276(3) that relate to the complainant's and public's interests. Stage one also has a lower threshold for the probative value of evidence.

[17] ***Ecker*** is an appellate court decision still referred to while ***Roberts*** has been cited once in subsequent jurisprudence, in respect of a separate issue. I consider that there is merit in the reasoning in both cases and that there may not be much in the way of actual difference between them. The stage one analysis is not merely technical and

administrative, but serves as a screening process to determine whether the evidence set out in the materials filed, taken in its best light, is capable of being admitted in a manner that does not offend s. 276(1). If so, then the matter proceeds to the stage two hearing where the evidence is more carefully scrutinized in light of a consideration of the factors set out in s. 276(3). The test to be applied in the stage one analysis clearly sets a lower threshold than that of the stage two analysis.

[18] At the stage two hearing, the original materials can be supplemented by further affidavit evidence or *viva voce* testimony. (***R.*** v. ***Quesnelle,*** 2010 ONSC 2698, paras. 25-27). It is at the second stage that the factors set out in s. 276(3) provide the most guidance.

Analysis

[19] At the outset, I find that Exhibits A and B attached to the September 8, 2010 Affidavit of W.A. do not meet the criteria of s. 276.1 and therefore will not be further considered for admissibility. The evidence is somewhat dated, with the list having been prepared between 2003 and 2005, and the letter in 2000. There is nothing in the way of detail in Exhibit A, beyond names and the type of alleged sex. I note that Exhibit B does provide more detail than Exhibit A.

[20] The evidence of alleged sexual activity is largely unrelated to the two accused, in particular with respect to P.A. While the list does refer to sexual activity between the complainant and either of the two accused, as well as to three-way sexual activity with W.A. and a third party, I find the evidence is not capable of being admitted without offending s. 276(1). It is not sufficiently specific or relevant, and it lacks probative

value. The prejudicial effect upon the complainant and the administration of justice is significant. The ability of the defendants to make full answer and defence is not compromised by keeping this evidence out. As stated in ***R. v. Darrach***, 2000 SCC 46, at para. 56, "…the affidavit must …establish a connection between the complainant's sexual history and the accused's defence". I find that the connection in this case is so remote as to render the evidence incapable of being admitted at trial.

[21] I will now turn to a consideration of the admissibility of consensual sexual activity between the complainant and the defendants, including three-way sexual activity involving the complainant and both defendants.

[22] In order to determine whether this evidence is admissible under s. 276(2), I must examine whether the evidence complies with the criteria in s. 276(2) and, in doing so, consider the enumerated factors in s. 276(3).

Specific instances of sexual activity

[23] The affidavits are somewhat vague with respect to details of the consensual sexual activity. The reference to consensual three-way sexual activity approximately one month before the date of the alleged sexual assault contains some detail, although not much. Other than this, there are simply allegations of three-way sexual activity occurring on several occasions since 2004 with little in the way of detail beyond the general location and the pattern of drinking, talking about sex, and then engaging in consensual three-way sexual activity. The alleged sexual activity would vary from intercourse to oral sex or to W.A. simply watching P.A. and the complainant having sex. The affidavit of P.A., filed August 31, 2010, sets out in paras. 9 – 12 the only details

regarding the alleged sexual assault that is the subject of these proceedings. P.A.'s version of this event is not dissimilar from the limited context provided for the other alleged incidents of consensual three-way sexual activity.

[24] The details regarding the existence of a prior consensual sexual relationship between the complainant and each of the accused is little more than the simple assertion of the existence of such a relationship.

[25] The objective of s. 276(2) is to "…ensure that any cross-examination of the complainant is not with respect to general reputation and is specific enough to provide adequate notice to the Crown and the complainants of the evidence sought to be adduced so that they can properly respond." (***Quesnelle*** at para. 42; see also ***R.*** v. ***B(B.)*** (2009), 64 C.R. (6th) 58 (Ont. S.C.) at para. 16).

[26] I find that the detail contained in the affidavit evidence is sufficient in these circumstances, albeit barely, to meet the specificity requirement of s. 276(2). In so finding, I am considering the factors enumerated in s. 276(3) and the other two criteria of s. 276(2). The extent to which defence counsel may be able to adduce this evidence can be limited, and the lack of specificity provided can assist in determining these limits.

Relevance of the evidence

[27] The relevance of evidence of prior sexual conduct lies in its ability to place the allegation of sexual assault within the proper and appropriate context. Section 276 is "…designed to exclude irrelevant information and only that relevant information that is more prejudicial to the administration of justice than it is probative. The accused's right

to a fair trial is, of course, of fundamental concern to the administration of justice". (***Darrach*** at para. 43)

[28] Crown counsel has raised the issue of the "consent" defence of the accused as being a bar to the relevance of this evidence. In the case of ***R.*** v. ***Dickson*** (1993), 21 C.R. (4th) 8 (Y.T.C.A.), the accused sought to have evidence of the complainant's prior sexual conduct admitted into trial. The defence was honest but mistaken belief in consent. Prowse, J.A., writing for the majority, ruled that the trial judge erred in allowing cross-examination of the complainant on her prior sexual conduct. She found that although defence counsel submitted that the defence was honest but mistaken belief in consent, during the *voir dire* the testimony of the accused gave rise to the defence of consent only.

[29] Prowse J.A. stated in paras. 36 and 37:

> In my view, although the evidence of a sexual relationship between an accused and a complainant proximate in time to the offences alleged might well support a defence of honest but mistaken belief in consent in some circumstances, it could not do so where the evidence of the Accused himself did not support such a defence. In fact, when the accused gave evidence following the voir dire, it became obvious that his defence to Count 1 was consent, not honest but mistaken belief in consent. …
>
> Since the evidence on the voir dire did not raise the defence of honest but mistaken belief in consent, and since no other basis has been suggested for the admission of the evidence, I conclude that the learned trial judge erred in admitting the evidence and allowing the complainant to be cross-examined on the basis of that evidence.

[30] The judgment of Prowse J.A. was upheld by the Supreme Court of Canada, [1994], 1 S.C.R. 153, with the simple statement that the order for a new trial was properly made. (For further comment by the Supreme Court on ***Dickson***, see also ***Darrach*** at para. 57)

[31] Gonthier J. in ***Darrach*** stated at paras. 58 and 59 that:

> Evidence of prior sexual activity will rarely be relevant to support a denial that sexual activity took place or to establish consent…As the Court affirmed in *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (S.C.C.), at para. 27, the determination of consent is "only concerned with the complainant's perspective. The approach is purely subjective." Actual consent must be given for each instance of sexual activity.
>
> Section 276 is most often used in attempts to substantiate claims of an honest but mistaken belief in consent. To make out the defence, the accused must show that "he believed that the complainant *communicated consent to engage in the sexual activity in question (Ewanchuk, supra*, at para. 46 (emphasis in the original)). To establish that the complainant's prior sexual activity is relevant to his mistaken belief during the alleged assault, the accused must provide some evidence of what he believed at the time of the alleged assault. …

[32] The decision in ***Darrach*** with respect to the relevance of the claimant's prior sexual activity to a defence of consent has been the subject of commentary. Professor Don Stuart, in the annotation to ***R. v. Strickland*** (2007), 45 C.R. (6th) 183 (Ont. S.C.), stated as follows:

> The Supreme Court in *Darrach* found that the rules in section 276(1) are not blanket exclusions and may lead to admission under the criteria of s. 276(2). Can that include evidence on the issue of consent? Consent is often the central issue since the Supreme Court in *Ewanchuk*, [1999] 1 S.C.R. 330 so drastically narrowed the defence of

> mistaken belief in consent. The problem is that Darrach is not at all clear, indicating at one point that such evidence would never be admissible on the issue of consent and at others that such evidence is rarely admissible to show consent.

[33] Professor Stuart notes that the House of Lords in *Regina v. A. (No 2)*, [2001] 2 W.L.R. 1546 "…somehow read Darrach as not applying rape shield principles equally to prior sexual history with the accused", and quoted from the reasoning of Lord Steyn as follows:

> As a matter of common sense, a prior sexual relationship between the complainant and the accused may, depending on the circumstances, be relevant to the issue of consent. It is a species of prospectant evidence which may throw light on the complainant's state of mind. It cannot, of course, prove that she consented on the occasion in question.

[34] I concur with the reasoning of Heeney J. in ***Strickland*** at paras. 23 and 24, where he writes that evidence about an existing sexual relationship between the accused and the complainant is logically relevant to the issue of consent.

> It cannot be doubted that it is more probable that a complainant would consent to sex with a person with whom she had an established sexual relationship than with a person who was a complete stranger. …
>
> While the past sexual relationship between the accused and the complainant would, in this way, be used to support an inference of an increased likelihood that the complainant consented to sex on the occasion in question, it does not do so in a way that offends s. 276… Suffice it to say that the Supreme Court of Canada has made it clear that s. 276 is not a blanket prohibition against ever using the sexual history of the complainant on the issue of consent. Such evidence is only inadmissible where the defence seeks to use it in a way that invokes the "twin myths", i.e. that an unchaste woman is more likely to consent to sex, and is less worthy of belief. The words "by reason of the sexual nature of the activity" in s. 276 express Parliament's intention that it is inferences from the sexual nature of the activity, as

> opposed to inferences from other potentially relevant features of the activity, that are prohibited.

[35] The reasoning at paragraphs 31 – 35 of ***Strickland*** has been adopted by Gower J. in ***R.*** v. ***Field,*** 2010 YKSC 11 at para. 4:

> In particular, I adopt what the Court said in that case at paras. 31 through 35 as being applicable here:
>
> > 31. While such evidence is logically probative on the issue of consent, it is not strongly probative. Saying that the complainant is more likely to consent to having sex with a person with whom she has an established sexual relationship than if no such relationship existed at all, is a long way from saying that such evidence could ever prove consent. Clearly it could not. The determination of consent is a subjective approach which is only concerned with the complainant's perspective. The inference of an increased likelihood of consent flowing from the existence of an ongoing sexual relationship is only one background piece of circumstantial evidence against which the jury would assess the conflicting direct evidence as to whether she did or did not consent. It is an open question whether or not such evidence meets the threshold of "significant" probative value demanded by s. 276(2)(c).
> >
> > 32. However, such evidence has, in my view, significant evidentiary value as context - context that serves to prevent the jury from embarking on areas of enquiry that would distort the fact-finding process as they consider the issue of consent.
> >
> > 33. I postulated above a general rule that people don't normally have sex with strangers, but are typically involved in a relationship. Juries know this rule. Hence, a jury will be looking for a relationship between the parties to add credence to the evidence of an accused that the complainant consented to sex on the night in question. Absent evidence of an

> existing relationship, a jury might well ask: why would the complainant suddenly agree to have sex with a virtual stranger? Where is the relationship between these parties? What happened between the two of them on that single night that makes it probable that they would end up consensually in bed together by the end of it?
>
> 34. If the accused is prevented from putting the existence of an ongoing sexual relationship between himself and the complainant into evidence, the trier of fact might well assume that none existed and that the accused and the complainant were little more than strangers. This misapprehension has the potential to make the evidence of the accused appear inherently improbable, and could result in his evidence being rejected for a reason that does not, in fact, exist.
>
> 35. The probative value of this contextual evidence is not to support the inference of an increased likelihood of consent. Rather, it is to dispel the inference of the unlikelihood of consent, which would result if the jury were left with the misapprehension that the sexual relations in question must have occurred on the sudden, with no pre-existing relationship between the parties." (See also ***B.(B.)*** at paras. 19-21)

[36] As stated in ***Darrach***, at para. 2:

> …the current s. 276 categorically prohibits evidence of a complainant's sexual history only when it is used to support one of two general inferences. They are that a person is more likely to have consented to the sexual assault and that she is less credible as a witness by virtue of her prior sexual experience. Evidence of sexual activity may be admissible, however, to substantiate other inferences.

[37] Gonthier J. in ***Darrach***, at para. 35, notes that evidence of prior sexual activity may be admissible for a non-sexual purpose, such as to show a pattern of conduct or a prior inconsistent statement. It appears that the complainant in this case may have denied, in a statement provided to the RCMP, the existence of any prior consensual sexual activity with P.A., while elsewhere having admitted to such a relationship.

Whether the complainant is in fact going to be confronted with a prior inconsistent statement based upon any previous sexual activity with P.A. remains to be seen. While this is not a factor in my decision, it illustrates an example where evidence of prior sexual activity may be admissible for reasons which do not fall afoul of s. 276(1).

Significance of the evidence and probative value vs. prejudicial effect

[38] The Court in ***Darrach*** at para. 39 held that the meaning of the word "significant" in s. 276(2)(c) means that the evidence must not be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt, but does not require the accused to demonstrate strong and compelling reasons for the admission of the evidence.

[39] Evidence of the existence of a prior consensual sexual relationship between each of the defendants and the complainant, including consensual three-way sexual activity, for the reasons provided above, is significant and has probative value in that it provides context for the defence of consent as well as in appropriate circumstances, honest but mistaken belief in consent, and perhaps could establish a recent pattern of conduct with respect to the alleged consensual three-way sexual activity.

[40] As both have been raised here, I will say only this about the interaction between the defence of consent and the defence of honest but mistaken belief in consent. The consent of a complainant to sexual activity requires a subjective approach and is concerned with the complainant's state of mind only. However, even if a defendant argues consent as a defence, that does not mean that the defence of honest but

mistaken belief in consent is automatically denied him should the court hold that the complainant did not consent.

[41] In evaluating the probative verses prejudicial effect of the evidence on the administration of justice, the enumerated factors of s. 276(3) apply as follows:

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

[42] The right to make full answer and defence would be hindered if the accused were required to rely on the defence of consent, or honest but mistaken belief in consent, in a context which did not include the trier of fact knowing of the existence of a prior sexual relationship between the complainant and the defendants. This would, as stated in para. 50 of ***Strickland***, "…add an artificial element of improbability…" to the evidence of the accused.

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

[43] It is, of course, important to encourage victims of sexual assault to report these offences and to testify, if required, so that offenders can be arrested, tried, convicted and sentenced. The provisions of ss. 276 and 276.1 are designed to prevent complainants in sexual assault cases from having their prior sexual history exposed in open court, subject, of course, to certain specified exceptions. In this case the existence of a prior sexual relationship with W.A. would not come as a surprise to anyone, as the complainant was married to him. The fact that she had a prior consensual sexual relationship with P.A., while not as readily to be presumed, would nonetheless, in the circumstances, cause little in the way of additional embarrassment.

> Questioning about consensual three-way sexual activity might be more embarrassing for the complainant. The risk of embarrassment could, in a general sense, inhibit the reporting of sexual offences. Care must be taken when deciding whether questioning about sexual activity of this nature should be allowed, and, if so, the extent to which the complainant should be questioned. This concern is one factor for consideration in the overall context.

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

[44] For the reasons given in (a), I find that there is a reasonable prospect that the evidence will assist in the fact-finding process.

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

[45] In this case the focus of the evidence and the enquiry is on the pre-existing relationship between the parties and is not in any way related to any bias regarding the character of the complainant.

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

[46] I find that the evidence that may be adduced, as limited by this ruling, would not give rise to any such sentiments and would not interfere with the fact-finding process. To some extent, in the circumstances of this case, any such sentiments, should they arise, could well be directed in a manner that would be favourable or sympathetic to the complainant.

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

[47] There is clearly some potential negative impact upon the complainant's personal dignity and right of privacy. To the extent that the evidence to be adduced is to be limited in scope, this potential negative impact will be lessened. I am aware it cannot be entirely avoided.

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

[48] This aspect balances the rights of both the complainant and the accused. There is a necessary accommodation in some circumstances which requires, in order to provide accused individuals with their right to make full answer and defence, that there be some intrusion into the personal security of a complainant. The full protection of the law for the complainant requires that this intrusion be as minimal as possible . My ruling in this case balances these rights.

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

[49] I do not consider there to be any other factors that militate either for or against the admission of this evidence.

Conclusion

[50] I find that evidence about alleged consensual sexual activity between the complainant and the two accused is capable of being admissible under s. 276.1.

[51] Further, for the reasons stated above, I find that this evidence meets the criteria of s. 276(2) for admissibility, after a consideration of the factors set out in s. 276(3). The

limitations on the extent to which this evidence is to be adduced is as set out in paras. 8 and 9 herein.

[52] The following paragraph from ***Strickland*** at para. 46 is applicable to this case:

> …I conclude that the evidence of an existing sexual relationship between the parties is a significant and essential contextual fact, without which the trier of fact cannot fully and fairly assess the behaviour of the parties on the night in question, the testimony of the complainant that she did not consent, and the testimony of the accused that she did. To prevent the accused from putting the evidence of this existing relationship before the court is to run the risk of distorting the fact-finding process and artificially rendering his [their] evidence inherently improbable. This would, in my view, deprive him [them] of the right to make full answer and defence.

_____

COZENS T.C.J.